Appeal No. UKEAT/0211/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 December 2013

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

MISS S BENSTED — APPELLANT

A STAR EDUCATION LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JANE MULCAHY (of Counsel) Bar Pro Bono Unit
For the Respondent	MS JENNIFER SAGE (Representative)

SUMMARY

PRACTICE AND PROCEDURE – Imposition of deposit

The Employment Judge failed to address rule 20(2) and 20(3) of the 2004 ET Rules as she failed (a) not to refer to the material she considered (b) how she engaged with key material and (c) how she arrived on the figures for deposit orders, **Simpson v (1) Chief Constable of Strathclyde Police (2) Scottish Police Services Authority** UKEATS/0030/11/BI, 10/1/12 considered.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the order on a Pre-Trial Review by Employment Judge Mulvaney sitting in Bristol on 1 March 2012. The hearing was conducted by telephone. The Claimant, Miss Bensted, represented herself over the telephone and the Respondent was represented by Ms Sage over the telephone. The written reasons were sent to the parties on 15 March 2013 but it is clear that the Employment Judge produced her written reasons on 1 March. For some reason there was a time gap before they were sent out.

2. Only the issue of the amount of the deposit is relevant to this appeal. There is no appeal against the Employment Judge's findings that the claims for unfair dismissal had little reasonable prospect of success. No deposit was paid and by an order dated 20 April 2012, the claims of unfair dismissal were struck out. The telephone hearing appears to have lasted between one to two hours. I have no transcript and no Employment Judge's notes of evidence. I have no factual material about what was said in relation to the Appellant's means. I have various assertions in the Respondent's skeleton argument and in a letter from the Appellant to the Employment Tribunal.

3. Today the Appellant has been represented by Ms Mulcahy, acting through the Bar Pro Bono Unit. The Respondent is represented by Ms Jennifer Sage. I am grateful to both Ms Mulcahy and Ms Sage for their written and oral submissions.

The material facts

4. These are helpfully set out in the chronology produced by Ms Mulcahy. On 1 March 2011 the Claimant received an offer of employment letter from the Respondents. She was told that her notice period was one month. On 6 April 2011 the Claimant began her

employment with the Respondent. On 6 October 2011 she was given 30 days' notice and on 7 November 2011 her employment ended. She issued proceedings in the Bristol Employment Tribunal on 20 December 2011. On 17 January 2012 the Respondent filed its ET3. On 18 January 2012 the Claimant sent a letter to the Employment Tribunal with a number of enclosures. The letter begins by saying this:

> **"I am writing, as directed, to set out the remedy I am seeking with respect to my claim for unfair dismissal, and to outline the measures I have taken to reduce my losses as a result of my dismissal. According to my understanding, this letter is for that purpose alone and, for this reason, I have not attempted to address the Health and Safety Issues that form the basis of my claim."**

5. Miss Bensted then sets out what she says she is entitled to by way of compensation under the basic award and under the compensatory award. She refers in that letter to the fact that she owns two properties and has two mortgages. One of the properties is a buy-to-let, and she sets out a number of expenses that she has incurred and the fact that she has been making payments by credit card. She sets out a number of expenses which she says are related to her claim. I make no comment upon them.

6. On 30 January 2012 all of the documents, apart from the covering letter, which Miss Bensted had sent to the Employment Tribunal were returned to her as not being necessary at that stage of the proceedings. A Pre-Hearing Review had been ordered on 19 January 2012 and it eventually, as I say, took place by telephone on 1 March 2012. Prior to that occasion both parties had made written submissions for the PHR.

7. The order made on the PHR is very short. It says this:

> **"The Claimant's claim of breach of contract based on her assertion that she was entitled to participate in a share option scheme is struck out as having no reasonable prospect of success."**

No issue arises on that.

> **"The claim relating to failure to pay the Claimant her full notice is not struck out."**

This was subsequently heard and an award made to the Claimant.

> **"The Employment Judge considers that the Claimant's contentions relating to her claims of automatic unfair dismissal under sections 100 and 101a Employment Rights Act 1996 have little reasonable prospect of success. The Claimant is ORDERED to pay a deposit of £300 in respect of each of those claims (£600 in total) not later than 21 days from the date of this Order is sent as a condition of being permitted to continue to take part in the proceedings relating to those matters. The Judge has taken account of any information available as to the Claimant's ability to comply with the Order in determining the amount of the deposit."**

8. There are then set out the Employment Judge's grounds at paragraphs 1 to 6 which deal with her reasoning as to why she has struck out the claim for breach of contract and why she regards the claims under s.100 and 101a of the **Employment Rights Act 1996** of little reasonable prospect of success. There is no reference in the grounds to the information the Employment Judge has taken account of, nor to how she reaches the figure of £300 in respect of the two claims for statutory unfair dismissal.

Rule 20

9. The **Employment Tribunal's (Constitution Rules of Procedure) Regulations 2004** governed the matter at 1 March 2012. Schedule 1 rule 20 says this:

> **(1) At a Pre-Hearing Review if a Employment Judge considers that the contentions put forward by any party in relation to a matter required to be determined by a Tribunal have little reasonable prospect of success, the Employment Judge may make an order against that party requiring the party to pay a deposit of an amount not exceeding £500 as a condition of being permitted to continue to take part in the proceedings relating to that matter.**
>
> **(2) No order shall be made under this rule unless the Employment Judge has taken reasonable steps to ascertain the ability of the party against whom it is proposed to make the order to comply with such an order, and has taken account of any information so ascertained in determining the amount of the deposit.**
>
> **(3) An order made under this rule, and the Employment Judge's grounds for making such an order, shall be recorded in a document signed by the Employment Judge. […]"**

It then goes on to say that a copy of that document will be sent to each the party with an explanatory note explaining the effect of the deposit order.

10. I was referred by both parties to the Judgment of Lady Smith sitting at the Employment Appeal Tribunal in Scotland on 10 January 2012 in **Simpson v (1) Chief Constable of Strathclyde Police (2) Scottish Police Services Authority** UKEATS/0030/11/BI. I found that case of considerable help. I did some research to see whether there was any other authority on the point, as did Ms Mulcahy. Neither of us have been able to find any.

11. I make the following comments about that case. At first it is clear from the Judgment of Lady Smith that the Employment Judge conducted a rule 20 determination in two stages. First, he made a determination that the Claimant's claim had little reasonable prospects of success, for reasons that he gave in a Judgment dated 2 November 2010. He then conducted a second hearing in relation to the size of the deposit. The reason was that he did not have the information in front of him at the first hearing which enabled him to make that determination. Second, it is clear that at the second PHR the Employment Judge in that case had a very substantial amount of detailed information about the Claimant's means (see the Judgment of Lady Smith at paragraph 7). Third, it is clear that the Employment Judge gave a full reasoned Judgment after hearing submissions from both parties (see the Judgment of Lady Smith at paragraphs 8 - 13). It is clear that the reasons of the Employment Judge ran to over 30 paragraphs.

The grounds of appeal

12. The original and amended Notices of Appeal put forward a number of grounds of appeal. However, at a rule 3(10) hearing before HHJ McMullen QC on 23 April 2013, he permitted

only a single ground of appeal to go forward to a full hearing, which is the hearing before me today. Paragraph 2 of the order of 23 April 2013 says this:

> **"This appeal be set down for a full hearing on the question whether the Employment Judge erred in making a deposit order, there being no challenge to her opinion given under Rule 20(1)."**

13. Ms Mulcahy this morning submitted essentially two points. The first point is that there was a failure by the Employment Judge to comply with rule 20(2), or putting it in a slightly different way, that there is nothing on the face of the order that shows (a) what material was in front of the Judge and (b) how she engaged with it. Her second point is that the order made does not disclose any grounds for making adequate or intelligible grounds for making the order.

14. Ms Sage has made a series of submissions which address the material that she says was in front of the Employment Judge on 1 March 2012 and I have been shown a substantial ring binder of documents supplied by the Employment Tribunal at the direction of Judge McMullen at the rule 3(10) hearing.

Discussion

15. The problem in this case is the brevity of the Judgment. I will re-read the relevant part of the order:

> **"The Employment Judge considers that the Claimant's contentions relating to her claims of automatic unfair dismissal under sections 100 and 101a Employment Rights Act 1996 have little reasonable prospect of success."**

As I have pointed out there is no appeal against that. It goes on:

> **"The Claimant is ORDERED to pay a deposit of £300 in respect of each of those claims (£600 in total) not later than 21 days from the date of this Order is sent as a condition of being permitted to continue to take part in the proceedings relating to those matters. The Judge has**

taken account of any information available as to the Claimant's ability to comply with the Order in determining the amount of the deposit."

16. That is the totality of the order in relation to the amount of the deposit. It, of course, forms part, as the document itself makes clear, of the order. The grounds, which appear at core bundle pages 2 and 3, make no reference whatsoever to the information that was in front of the judge and which parts of it she found persuasive. There is no reasoning as to why she fixed on the amount of £300 as reasonable for this particular Claimant to pay.

17. I have listened very carefully to Ms Sage's very helpful and cogent submissions, but at the end of the day I find it quite impossible to see how the Appellant or myself can understand the following. First, what material the Employment Judge took into account and the reason for that is very simple: she does not refer to it in any way other than she has taken account of any information available as to the Claimant's ability to comply with a deposit order. There is quite clearly, potentially, a very substantial amount of material that she may or may not have taken into account, but since she does not refer to any of it, it is quite impossible to say what influenced her or how she engaged with it.

18. Second, it is not clear to the Claimant or me what reasonable steps she took to ascertain the Appellant's ability to comply with the deposit order. On those two points see the 2004 Regulations, Schedule 1 rule 20(2). Third, what were the Employment Judge's reasons for making the order (see rule 20(3)). I think in this context it is also helpful to refer to the well-known case of **Meek v City of Birmingham District Council** [1987] IRLR 250 and the line of cases which follow it.

Conclusions

19. For these reasons, the appeal will be allowed.

Disposal

20. The original submission by Ms Mulcahy in her skeleton argument, and at the request of Ms Bensted, was that I should substitute my decision for that of the Employment Judge on the basis of the material before me. Ms Sage submits that I should remit this case to the same Employment Judge. In the course of submissions, Ms Mulcahy accepted that the material before me was insufficient to enable me to substitute my decision for that of the Employment Judge. I agree with that. Not least, it is quite clear that Ms Bensted was asked some questions by the Employment Judge about her means. They are not recorded in any way before me.

21. There is, of course, a further point. By allowing this appeal the issue has to be re-determined. It has to be re-determined at the date of the re-determination. This case is not frozen in time. It may well be that Ms Bensted's financial circumstances have changed; I know not. In my judgment, it is appropriate to remit this case to the same Employment Judge for her to reach her decision as to the amount of the deposits in the light of this Judgment. I have had regard to the decision of this Tribunal in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, but in my judgment none of those factors are engaged and it does not justify remitting the case to an alternative Employment Judge. The issue is a discrete one which I am sure can be dealt with by the same Employment Judge.