Appeal No. UKEAT/0117/13/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 July 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

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(1) ALBERT THOMAS
(2) DINESH SHRESTHE
(3) ACKIM CHARLES APPELLANTS

TAYLORS OF ST JAMES LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR M EGAN (of Counsel) Instructed by: Reculver Solicitors 12-16 Clerkenwell Road London EC1M 5PQ
For the Respondent	No appearance or representation for or on behalf of the Respondent

SUMMARY

NATIONAL MINIMUM WAGE

Judgment on liability was entered without hearing evidence in default for both alternative ways in which the Claimants advanced their claim for wages: at the National Minimum Wage rate alternatively at a higher rate claimed under an alleged contract. A different Employment Judge conducting a hearing on remedy concluded on the evidence that the Claimants had not established that they had an entitlement to the higher contractual amount claimed. She made an award based on the NMW. It was necessary for the Employment Judge determining remedy to decide between the two alternative bases of claim advanced in the ET1s. Choosing either would necessarily have been a rejection of one of the bases on which the liability Judgment was given. It was not accepted that the EJ on the remedies hearing was bound to make an award on the basis most beneficial to the Claimants.

Appeal dismissed.

THE HONOURABLE MRS JUSTICE SLADE DBE

Introduction

1. The Claimants brought claims against the Respondent for unauthorised deduction from wages and for breach of contract. The claims were under the **National Minimum Wages Act** (NMWA) and in the alternative in contract. The Respondent failed to present a response to their claims within the time required, and in a Judgment sent to the parties on 13 September 2013 an Employment Judge (the first Employment Judge) entered a default Judgment on liability only. The Employment Judge considered the matter in chambers without a hearing. The default Judgment on liability only is recorded as follows:

> **"1. The Claimants complaints of unlawful deduction of wages & breach of contract are well founded.**
>
> **2. Any remedy to which the claimant is [sic] entitled will be decided at a hearing."**

2. A remedies hearing took place before a second Employment Judge on 2 October 2012. Judgment was sent to the parties on 12 November 2012. The second Employment Judge held that the Claimants were entitled to be paid the National Minimum Wage for all of the hours that they worked. Following their application for a review, the second Employment Judge clarified her Judgment and amended Reasons for the original decision were sent to the parties on 12 December 2012. The Claimants appeal from the remedies Judgment. They contend that the second Employment Judge erred in failing to hold that they were entitled to receive pay for the hours that they worked at a contractually agreed rate and not at the rate of the National Minimum Wage, which was much lower.

Background

3. The facts which gave rise to the claims were that the Claimants were drivers and packers employed by the Respondent. The documentation from the Respondent led to a conclusion that

they were to be paid at the rate of £18,000 per annum and that at one point they were told that this would result in an hourly rate of £6.92. Doing the calculations, that would result in a usual working week of 42.5 hours. The Claimants all stated that they worked at least 60 hours per week and that throughout their employment they had not received any payment for their work in addition to the £18,000 per annum.

4. The ET1s lodged on their behalf set out first their claims under the NMWA and claims for unlawful deduction from wages. The Schedule of Loss for each of the Claimants was calculated on the basis of claiming a National Minimum Wage payment for each of the 60 hours per week that they worked. The claims were framed in the alternative as follows:

> **"31. Further or in the alternative the contractual hourly rate for each of the Claimants was £6.92 per hour. There was a contractual obligation on the part of the Respondent to pay the Employees at least £6.92 for any time worked over the basic 42.5 hours per week.**
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> **32. The Respondent failed to pay overtime at that hourly rate. Therefore there was an unlawful deduction of wages in the sum of at least £121.10 gross per week (17.5 hours per week x £6.92) which has continued throughout the period of the Claimant's [sic] employment until their employment ended by reason of redundancy on the 5th April 2012."**

5. Related to their contractual claim, is a box in the Schedule for each of the Claimants, which reads "in the alternative, failure to pay contractual hourly rate". The calculation of loss is the number of hours – 17.5, the difference between the 42.5 hours and the 60 hours that the Claimants said they worked each week – multiplied by £6.92 and the number of weeks each of the Claimants worked. A note to the Schedule of Loss for one of the Claimants states:

> **"The contractual hourly rate for each of the Claimants was £6.92 per hour. There was a contractual obligation on the part of the company to pay the Employees at least £6.92 for any time worked over the basic 42.5 hours per week."**

6. The second Employment Judge considering remedy heard evidence from the Claimants. She made the following material finding in the amended Reasons:

> **"8. I find that the contractual provisions regarding hourly pay were that the Claimants would work the hours as required for a fixed salary of £18,000 a year. I find that there was no entitlement (other than pursuant to national minimum wage provisions) to additional pay for the hours worked over and above 42.5 per week. I find that these terms were made clear to the Claimants when they joined, are reflected in the contractual documentation and were repeated when queried by the Claimants."**
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> **9. If I am wrong and there was a breach of contract by the Respondent in failing to pay additional pay for the additional hours, I find that the breach was accepted by the Claimants continuing to work in the knowledge of the Respondent's position on the issue."**

7. Accordingly, the second Employment Judge then proceeded to make awards based on the National Minimum Wage for 60 hours per week and the shortfall between the resultant sum and the amount actually paid to each of the Claimants.

8. The Claimants contend that the second Employment Judge erred in awarding a remedy on the basis of the National Minimum Wage rather than on the basis of the contract that had been asserted by them. There was a difference in the resulting sum depending on whether calculation of shortfall was based on the National Minimum Wage or the alleged contract, the contractual claim resulting in a higher sum for the Claimants.

The appeal

9. It was contended by Mr Egan, counsel on behalf of the Claimants, that the first Employment Judge made a liability default Judgment on the basis of the ET1s submitted. That Employment Judge therefore made a default Judgment in favour of the Claimants both on their National Minimum Wage claim, called by the first Employment Judge the complaint of unlawful deduction of wages, *and* – and this is something emphasised by Mr Egan – breach of contract. Mr Egan contends that the reference to the finding of liability on breach of contract as well as unlawful deduction of wages is clearly a reference to the claim that there was a breach of the agreement to pay £6.92 to the Claimants for any hours that they worked over 42.5 hours

per week. That claim was found to be well founded in addition to the unlawful deduction of wages claim, so called, which was a reference to the claim under the NMWA.

10. Mr Egan contended that the second Employment Judge erred in embarking on an enquiry and reaching a conclusion that the Claimants were entitled to a remedy based on the National Minimum Wage claim. Initially, he contended that so acting was inconsistent with the default Judgment on liability. In that regard he relied on the Judgment of HHJ Peter Clark in **Eaton v Spencer & Ors t/a Wiggles Experience (A Firm)** [2001] UKEAT/0177/11, in which HHJ Peter Clark adopted the principle that was applied to the CPR 13, now CPR 12, by the Court of Appeal in **Lunnun v Singh and Ors** [1999] CPLR 587 and in particular the passage at page 600 of the Judgment in the Judgment of Jonathan Parker J, in which he said:

> **"In my judgement, the underlying principle is that on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following a full hearing on the facts or a default judgment."**

11. However, Mr Egan rightly recognised that since the default Judgment reached by the first Employment Judge was in favour of the Claimants both on the National Minimum Wage claim and their contract claim it cannot be said that a Judge hearing the remedies claim opting for one or the other is reaching a judgment that is inconsistent with the decision on liability. It necessarily must be the case that damages or an amount claimed as deduction from wages had to be awarded on one basis or another, either on the basis of the National Minimum Wage provisions or on the basis of the contract as asserted in the ET1s. Whichever route is taken by the Judge in the remedies hearing will be accepting one basis of the liability decision and rejecting the other basis. Accordingly, there is no inconsistency in the remedies Judge following, of necessity, one route or the other.

12. Mr Egan submitted that, faced with a situation such as this where an Employment Judge makes a default Judgment on liability on the basis of an ET1 presented on two alternative bases and where, as here, he states, that Judgment was accepting both bases the bases that is the most beneficial in financial terms to the Claimants must be accepted. Mr Egan fairly recognises that there is no authority for that proposition, but he advances it as a matter of justice to the Claimants.

Discussion and conclusions

13. The first Employment Judge took a decision to enter a default Judgment in chambers without hearing evidence and without deciding between the two competing contentions advanced by the Claimants for their money claim. The basis of the calculation of the claim under the National Minimum Wage legislation results in a different sum from that based on an alleged contract between the Claimants and the Respondent for payment for £6.92 per hour for all hours worked. In this case the claim is for hours worked over 42.5 per week, 17.5 hours. Since the Employment Judge did not hear evidence and did not decide between the two competing and alternative assertions in the ET1s, he entered a liability Judgment in favour of the Claimants on both bases. That is perhaps unsurprising, because on whichever basis the claim was pursued, the Claimants were entitled to a sum of money which was more than they were paid. The second Employment Judge had to reach a decision as to what sum of money each of the Claimants should be awarded. That sum would differ according to whether the claim was found to be a National Minimum Wage claim for all hours worked or one under the contract alleged by the Claimants for payment of £6.92 per hour for hours worked over 42.5 hours per week.

14. The second Employment Judge, unlike the first, did hear evidence, made findings of fact and reached conclusions upon them. The material finding of fact was set out in paragraph 8 of her Judgment. The Employment Judge's findings in that paragraph support her conclusion that there was no agreement between the parties for payment of £6.92 per hour for hours worked over 42.5 hours per week. Accordingly, it supported her conclusion that the Claimants were entitled to the National Minimum Wage for each of the 60 hours the Claimants worked each week.

15. A suggestion that reaching such a conclusion infringes the principle outlined in **Eaton** and in **Lunnun** is not accepted. As was rightly recognised by Mr Egan the conclusion reached by the second Employment Judge was not inconsistent with the default liability Judgment as the default liability Judgment gave judgment on both bases claimed in the ET1s of which the claim under the National Minimum Wage provisions was one. Accordingly, the second remedy Judgment was not inconsistent with that of the first Employment Judge.

16. The remaining matter advanced by Mr Egan, namely that, faced with two alternative bases for calculating the sums to be awarded, the second Employment Judge should have made an award that was most beneficial to the Claimants, is unsupported by any authority. As a matter of principle, in my judgment it cannot be said in these circumstances that an Employment Judge errs in failing to make the more favourable of two possible awards.

17. Accordingly, notwithstanding the succinct and properly targeted submissions of Mr Egan, who has said everything on behalf of these Claimants that could be said, this appeal is dismissed.