Appeal No. UKEAT/0563/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 July 2013

Before

HIS HONOUR JUDGE PETER CLARK

MR P GAMMON MBE

MS G MILLS CBE

CONNECT PERSONNEL LTD — APPELLANT

MRS A DOMANSKA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR ANDREW WATSON (of Counsel) (Appearing under the Free Representation Unit)

SUMMARY

PRACTICE AND PROCEDURE – Amendment

Whether point sufficiently raised by Claimant before Employment Tribunal; see **Chapman v Simon**. On the particular facts of this case it was; Respondent had ample opportunity to deal with it. ET Judgment upheld on Respondent's appeal.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This case has been proceeding in the London (South) Employment Tribunal. The parties, as we shall describe them, are Mrs Domanska, Claimant, and Connect Personnel Limited, Respondent. We have before us for full hearing an appeal by the Respondent raising a short point on the well-known principle of natural justice to be found in the Court of Appeal case of **Chapman v Simon** [1994] IRLR 124, articulated by Peter Gibson LJ at paragraph 44, namely that the tribunal should confine itself to the issues raised by the claimant in her form ET1, subject to any amendment being allowed.

2. In that case, the claimant raised three allegations of racial discrimination against her employer, all but one of which were dismissed by the tribunal, which then went on by a majority to find in her favour on a point not raised during the hearing and that was an impermissible approach, the Court of Appeal held.

Factual background

3. The factual background in the present case is that the Respondent is an employment agency. The Claimant registered with them as a temporary worker with a view to being placed with an end user as an agency worker (the temporary worker contract). It so happened that an employee within the Respondent's business, Ruksana Braz, was going on maternity leave. She was employed as an administrator in their Blackheath office. The Claimant was offered and accepted Ms Braz's position as maternity cover. She commenced work on 12 July 2010.

4. In January 2011 the Claimant informed the Respondent that she was pregnant and on 15 March 2011 Ms Braz notified the Respondent of her intention to return to work following maternity leave on 18 April 2011. As a result, after a short handover period, the Claimant was

informed by Mr Oba, the General Manager, that her temporary cover was ending there and then. She received a letter terminating her engagement dated 23 May 2011 and her form P45 which gave her date of leaving as 27 May 2011.

5. With the assistance of her local CAB she completed a form ET1 and presented it to the Tribunal. Her claim was that she was an employee and that her employment had ended because she was pregnant; an act of unlawful sex discrimination. In response the Respondent contended that she had never been an employee of the Respondent and that the Claimant had attended their offices and stated she did not wish to be retained on their books as a temporary worker available for work and asked for her P45, which was provided to her.

6. The claim came on for hearing before a Tribunal chaired by Employment Judge Corrigan on 10 and 11 April 2012. The Claimant appeared in person; the Respondent was represented by counsel. By a reserved Judgment with reasons dated 11 July 2012, that Tribunal upheld her complaint of pregnancy discrimination contrary to the **Equality Act 2010** and awarded her £4,000 compensation for injury to feelings and £530 in respect of lost earnings. It is against that finding on liability, but not quantum, that this appeal is brought.

7. On the issue of her status with the Respondent, the Tribunal took a third way between the rival positions of the parties. They found that she was an employee when carrying out maternity cover in the Blackheath office but was separately a worker, not employee, under the temporary worker contract. They held that her employment ended not because of pregnancy but because her temporary employment ended following the return of Ms Braz. That raised the question as to whether, on the Tribunal's findings, her temporary worker contract was terminated by reason of pregnancy. They found that it was. Having heard from Mr Oba they

did not accept his explanation for the termination of that contract (see paragraphs 42 to 43). They concluded that the discriminate claim in that respect was made out.

8. Was that the case advanced by the Claimant? At paragraphs 45 and 46 the Tribunal say this:

> **"45. In submissions the Respondent's Representative queried whether the Claimant's complaint was expressed as a complaint about the fact the terms of engagement were terminated because of pregnancy. The view that we have come to is that the Claimant's case on the claim form makes clear that her case is that she was an employee, that she was dismissed by the Respondent and that the reason for this was pregnancy. The Respondent on the other hand, in their ET3, replied saying that she was a temporary worker, that although an assignment was ended by them it was the Claimant that ended the temporary worker relationship by requesting a P45. In the ET3 the Respondent makes the distinction between the assignment working for them and the relationship generally, and makes their case that they consider that neither of those were ended due to pregnancy.**
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> **46. We find then that the case before us to be resolved, from the pleadings, is: what was the Claimant's status in relation to the Respondent, how did it end and by whom, and was it because of pregnancy? We have found that the Claimant was both a temporary worker, having signed the terms of engagement, and that she was an employee for the time she worked directly with the Respondent. We found the Respondent ended both relationships. We found that the employment was ended because the person on maternity leave that the Claimant was covering returned. The temporary worker arrangement was also ended by the Respondent, and we have not had a good explanation for this in circumstances where on the primary facts we can draw an inference it was on grounds of pregnancy. We therefore considered that the decision that we have come to is expressly responding to the issues that come straight out of the parties' pleadings."**

9. Thus the complaint was made by the Respondent's representative and dealt with in that way by the Tribunal. Thus, in our view, the Respondent was, unlike in **Chapman v Simon,** clearly on notice of the point. It emerged during the course of the hearing and in response to the Tribunal's potential ruling on the employee issue, resulting in not one but two contracts between the parties.

10. Mr Rees submits that it was not open to the Tribunal to make the relevant finding without an amendment, with permission, to the claim. We disagree. Mr Watson has referred us to the helpful passage in the Judgment of Langstaff J in **Ministry of Defence v Hay** [2008] ICR 1247 at paragraph 43. We shall not set it out in extenso but critically in considering the rule in

Chapman v Simon, the now President in that case, deals with the possibility of amendment and then says this:

> **"43. […] The purpose of a hearing, after all, is to allow the parties to resolve those matters which are truly in dispute between them, at least where this can be done without unfair prejudice to the position of either. Thus if a Respondent justifiably complained that there was a lack of clarity in a Claimant's originating application, then (depending of course, on the circumstances) an adjournment might well resolve any prejudice. The focus will be on whether a fair trial of the issues (as expanded) can take place."**

11. It seems to us that the point on which the Respondent lost was sufficiently raised during the evidence from the questioning of Mr Oba and was plainly live because counsel took the point in closing. He had every opportunity to deal with it. We agree with Mr Watson that this was an expansion of the issues during the hearing which did not require formal amendment in circumstances where the Respondent was fully on notice of the point. This is a case in which the Tribunal properly assisted the parties, including a Claimant in person for whom English is not her first language, in formulating the relevant issue within the applicable legal framework. In these circumstances, we can see no unfairness to the Respondent. Consequently, this appeal fails and is dismissed.