Appeal No. UKEAT/0349/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 January 2014

Before

MR RECORDER LUBA QC

(SITTING ALONE)

NORTHERN DIVER INTERNATIONAL LTD — APPELLANT

MR R D WARD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GWYNN PRICE ROWLANDS (of Counsel) Instructed by: Nexus Solicitors Carlton House 16-18 Albert Square Manchester M2 5PE
For the Respondent	Written Submissions

SUMMARY

UNFAIR DISMISSAL

Reasons for adjourning an appeal hearing and giving permission to amend the Notice of Appeal.

MR RECORDER LUBA QC

Introduction

1. There is listed before me for hearing an appeal in the matter of **Northern Diver v Mr R D Ward**. The company is the Appellant and the Respondent is its former employee, who had succeeded before the Liverpool Employment Tribunal in a claim for unfair dismissal. The appeal was considered on the sift by HHJ Peter Clark and, by order dated 3 July 2013, the matter was directed forward for a full hearing. In the usual way the Respondent has provided an Answer to the appeal and the appeal comes on for full hearing on the basis of the grounds set out in the original Notice of Appeal. Neither of the parties were represented before the Employment Tribunal and Mr Ward, the Respondent, is still without representation. Indeed, he has been unable to attend today's hearing, but the Appellant company has engaged the services of solicitors and counsel and has been represented before me by Mr Gwynn Price Rowlands.

2. In anticipation of today's hearing, the Appellant, pursuant to the directions made by HHJ Clark, prepared a bundle which was received by the Employment Appeal Tribunal on 17 December 2013 and, one infers, supplied also to the Respondent. Based upon that bundle, Mr Price Rowlands produced a skeleton argument, developing the sole ground set out in the Notice of Appeal, that is to say a perversity challenge to the Employment Judge's conclusions. For his part, Mr Ward, the Respondent, filed a helpful skeleton argument prepared by solicitors and addressed to the same matter.

3. Additionally, Mr Ward raised a point as to whether the appeal was in fact out of time. It seems sensible to deal with that matter immediately. It arises because, in the bundle prepared for the appeal, the Appellant had included a copy of the Notice of Appeal which bears the EAT date stamp of 17 July 2013. In fact, the Notice of Appeal was lodged on 18 April 2013 and that is confirmed not least by the recital to an order of HHJ Clark, made on 3 July 2013 pursuant to

which this appeal hearing was, as I have mentioned, convened. The date of 18 April 2013 was, it is common ground, a date which was in time for the lodging of the appeal and in those circumstances any preliminary point as to jurisdiction falls away.

The application for an adjournment

4. In the immediate lead-up to today's hearing, a number of things happened. Firstly, the Appellant company replaced the bundle which had been filed on 17 December 2013 with a new bundle filed on 17 January 2014. This bundle included half a dozen or so further documents which had not been included in the original bundle and removed some unnecessary copying from two lengthy documents which had been included in the original bundle: that is to say, the contract of employment and the staff handbook. The additional material added to the bundle was considered to be so significant by Mr Price Rowlands of counsel that he has provided an addendum to his skeleton argument dealing with this new material. The difficulty, of course, is that the Respondent has not had the advantage of the opportunity to respond to this new material or to the addendum to Mr Price Rowland's skeleton argument. Moreover, it became clear in the course of exchanges, as Mr Price Rowlands opened the appeal, that he wished to pursue in the alternative to the pleaded ground (perversity) a new and separate challenge based on a deficiency by the Tribunal in discharging its duty to give reasons. Moreover, his initial skeleton argument had already foreshadowed a further alternative potential ground of appeal based on the failure of the Tribunal, so it is said, to have considered reducing its award of compensation based on the employee's contributory fault.

5. Plainly it would have been unjust for me to have proceeded on that basis, with the new material, in the absence of the Respondent or in the absence of any opportunity for the Respondent to address these matters. Mr Price Rowlands recognised that that was so and

accordingly he applied for an adjournment and, on the back of that application, applied for permission to amend the Notice of Appeal if the adjournment be allowed.

6. It is not lightly that this Appeal Tribunal accedes to applications to adjourn made on the day of a hearing which has long since been notified to the parties. The consequence of any adjournment of today's hearing will be an extended period of uncertainty for both parties as to the outcome, with particular disadvantage to the Respondent employee. It will mean that there is further delay in resolving the appeal and it will mean that there will be prejudice suffered by other users of the Appeal Tribunal who could have used today's opportunity to have their own cases heard and who will be deprived of a future diary date because of the need to consider this case further. But, on the other hand, Mr Price Rowlands draws attention to the fact that the Respondent has not been put to any personal disadvantage or additional cost. He has not attended. He has not been represented. And therefore there is no 'cost disadvantage' consequent directly upon the adjournment. Further, he urges that the grounds of appeal he seeks to additionally advance are important and that justice requires that they be considered. It seems to me that, *prima facie*, the two additional grounds of appeal are at least arguable, and Mr Price Rowlands contends that his clients would be deprived of justice if they were not given an opportunity to argue them. He has specific instructions to make this application for the adjournment, notwithstanding the prejudice to his own clients in terms of costs that a further hearing will give rise to. Although he has not pressed the point, it is right also to identify that this is the <u>first</u> application made by this party for any adjournment.

7. In all the circumstances, and doing the best I can, applying the overriding objective as required by the Employment Appeal Tribunal Rules, I am satisfied that the application to adjourn this hearing should be allowed.

The application to amend the Notice of Appeal

8. I then turn to the application to amend the Notice of Appeal. The Notice of Appeal is itself unusually shortly stated. Its brevity is not a matter which should attract criticism but it is right to say that the precise 'perversity' alleged on the part of the Employment Judge does not leap from the page in the present drafting. It seems sensible that it should be reconsidered with the assistance of counsel. Moreover Mr Price Rowlands wishes to add two further grounds. The first he has given me is draft, relating to the reasons challenge. The second is self-evident from the terms of his initial skeleton argument. It seems to me that I should give permission to amend the Notice of Appeal by substitution and that the substituted Notice should be limited to these three grounds, that is to say (1) the perversity point originally taken, although re-expressed by Mr Price Rowlands (2) the reasons challenge, and (3) the contributory fault point. I have not required Mr Price Rowlands to reduce the whole into typescript for me at this hearing. I give him seven days to submit to me a substitute Notice of Appeal reflecting the terms I have identified.

9. Further, Mr Price Rowlands submits that this is a class of case in which, given that both of the parties were unrepresented below, it is right to direct that the Employment Judge supply his notes of the hearing, so that it may be clear which witnesses gave evidence and in relation to what matters. It seems to me that this is a point which should earlier have occurred to those representing the Appellant, not least by reference to the fact that the standard direction included at paragraph 4 of Judge Peter Clark's order of 3 July 2013 specifically draws the attention to the parties to the possibility of supplementing the evidence available to this Appeal Tribunal in the way there described. It seems to me that it is proper for that direction to remain in place. It is for the Appellant to explore with the Respondent whether it can be agreed that particular matters occurred or that particular evidence was given. Only if the parties cannot agree should this Appeal Tribunal, and in turn the Employment Judge, be put to the trouble of issuing a

direction for the Judge's notes and then the Judge to preparing them. In those circumstances, therefore, I do not at this stage allow Mr Price Rowlands' application for the Judge's notes. That must be the longstop fallback if no agreement can sensibly be reached between the parties.

10. I cannot end this Judgment without drawing attention to the proportionality of pursuit of this appeal. The amount of compensation awarded to the Respondent is not insignificant, but on the other hand it is not great. It may be that the parties are able to find, by negotiation and agreement between them, a better way of resolving this appeal than the matter being restored, as it otherwise will have to be, for a full hearing.

Disposal

11. My order will be: (1) that this appeal be set down for further hearing at a future date with a time estimate of half a day, Category B (2) that the Appellant shall have permission to submit a substituted Notice of Appeal identifying its three grounds of appeal within seven days of the sealed date of this order (3) the Respondent shall have 14 days from the date of service and filing of the Amended Notice of Appeal to supply, if so advised, an amended or substituted Answer. Thereafter there will appear in my order the standard directions in the exact terms of paragraphs 4-8 of HHJ Clark's order of 3 July 2013.