Appeal No. UKEAT/0325/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR C TIMBULAS — APPELLANT

THE CONSTRUCTION WORKERS GUILD LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GIDEON SHIRAZI (of Counsel) (Appearing through the Free Representation Unit)
For the Respondent	MR RHODRI DAVEY (Solicitor) Kitsons LLP Solicitors Minerva House Orchard Way Edginswell Business Park Torquay TQ2 7FA

SUMMARY

CONTRACT OF EMPLOYMENT – Sick pay and holiday pay

This is a case in which it is said there was an insufficiency of evidence. The Claimant was a construction worker, who claimed holiday pay. He said that he would have taken holidays, but could not tell the Employment Tribunal exactly which holidays he had taken. He said that the sites he had worked on were sometimes closed due to bad weather or perhaps other reasons. The Employment Judge made an order giving payment for Bank Holidays but declined to guess as to the rest of the holidays.

The second matter in the case relates to consequential loss, and it is said that submissions were made, to put it at its broadest, about consequential loss but that the Employment Judge did not deal with the matter, although the parties were prepared and, on one view at least, the paperwork raised the matter. While I cannot resolve any dispute of fact between the Claimant's representatives on the one hand and the Employment Judge on the other, I do hold that I should err on the side of caution and if there is any doubt that the Claimant was afforded a fair trial in the sense of having what he wanted to have put before the Employment Judge put before him, then I should err on the side of caution and allow the Claimant to have that part of his claim heard.

I have heard the parties on it today and I have done that because it seems to me to be in the interest of justice to do so.

THE HONOURABLE LADY STACEY

Introduction

1. This case is about holiday pay and damages for consequential loss. I will refer to the parties as "Claimant" and "Respondent". It is an appeal by the Claimant against the Judgment of Employment Judge Southam, sitting at Watford on 23 August 2012 on a remedy hearing. His Decision was sent to the parties with Reasons on September 2012. The Claimant was represented by Mr Peter of FRU there and here by Mr Shirazi. The Respondent was represented there by Miss Nicholson (Solicitor) and here by Mr Davey (Solicitor).

2. The claim was in respect of holiday pay. The Judgment of the Employment Judge was as follows:

> **"1. The respondent shall pay to the claimant the following gross sums in respect of annual leave:**
>
> **(a) For the period 10.11.2004 to 09.11.2010, the sum of £4,480.53**
>
> **(b) For the period 10.11.2010 to 30.09.2011, the sum of £547.57; and**
>
> **(c) By way of payment for accrued unused holiday entitlement for the period at (b) above, based on 325 days, and a gross entitlement of 25 days, less eight days taken: 17 days at £102.63, the sum of £1,744.71.**
>
> **2. The total of the above sums is £6,772.81."**

3. The Employment Judge had already decided at a liability hearing that the Claimant was entitled to claim pay for holidays actually taken throughout his period of work with the Respondent. He decided that he was not entitled to claim payment in respect of holiday entitlement but not taken. No appeal was pursued against that decision. A Notice of Appeal was lodged by the Respondents against the Employment Judge's liability decision, but that appeal did not proceed.

4. The Claimant did not appeal the part of the liability decision at page 59 of the bundle before me at paragraph 16 to the effect that the Claimant could claim in respect of unused holiday except in the last year of employment. Therefore what is before me today is an appeal in which two grounds of appeal were allowed, being Nos. 2 and 3 of a Notice of Appeal lodged by the Claimant. They are in the following terms:-

> **"The Judge erred in failing to make a finding about holiday days over Christmas.**
>
> **The Judge erred in failing to hear evidence or make a finding about consequential loss."**

5. The EAT directions, sending this case to a full hearing, were given by HHJ Serota QC at a rule 3(10) hearing, when he decided that, while the evidence was unsatisfactory, it had been found that some holiday had been taken. He also noted that consequential loss did not appear to have been the subject of judicial comment. It should be noted that this case had already been sent back on a **Burns-Barke** basis to enquire if the matter of consequential loss had been argued. The Judge's note in response to that request is found at page 81 of the present bundle and is in the following terms:-

> **"I have checked the claim and my notes of the substantive and remedy hearings. A claim for consequential loss did not appear in the claim form. Nor was such a claim mentioned in the claimant's witness statement or in his counsel's closing submissions at the substantive hearing. The written submissions at that hearing ended with Counsel asking that the tribunal award the claimant 'his holiday pay'.**
>
> **Nor was such a claim mentioned in the claimant's witness statement for the remedy hearing on 23 August 2012. For that hearing, he included a detailed calculation of the amount sought and that did not contain any element of consequential loss. I can find no reference in my notes of the remedy hearing being mentioned."**

6. Thus the Employment Judge's response is to the effect that he has no note of the point of consequential loss being mentioned at the remedy hearing. However, according to the grounds of appeal lodged by the Claimant, the following took place:

> **"At the Tribunal hearing on the remedy, the Claimant gave evidence. He was not able to identify by reference to exact days when he took holiday. The Judge asked the Respondent's representative to make submissions on this point. The Claimant's representative asked if**

submissions could be deferred so that he could call the Claimant's wife (present in the Tribunal) to give further evidence on this point but this was refused. Following the Respondent's submissions the Judge ruled that the Claimant's wife could not give evidence on the dates of holiday taken as she was likely to be tempted to lie about it.

Brief submissions were then made on the evidence about the Christmas period about limitation. In this discussion the Judge said that the Claimant was a self-employed worker and did not consider whether there was mutuality of obligation between the Claimant and the Respondent. The Judge asked both parties to leave so that he could decide the limitation point. The Claimant's representative said that he had further submissions on other points and the Judge said that he would hear them after deciding the limitation point.

When they returned the Judge gave Judgment on the entire case (save for one point about the final year which was dealt with by written submissions)."

7. Thus it can be seen that there is at least a degree of lack of clarity about what happened. It is alleged in the grounds of appeal that the Employment Judge declined to hear counsel despite counsel asking to be heard. As I have said, I cannot adjudicate on what happened as a matter of fact, but it does seem to me that there is a question mark over the procedure at the hearing, and it may be that the Claimant did not get the opportunity he expected to address the Employment Judge on consequential loss. It may be said his representative should have made his desire to speak more clear, but it seems to me that the interest of justice requires that the matter is heard, and I have done so today.

8. The parties were able, very helpfully, to tell me and to show me with the paperwork that there was no question of the Respondent being taken by surprise by there being a claim for consequential loss. Mr Davey was quite clear on that and of course was quite correct, because it was in some of the paperwork that had been lodged.

9. A separate matter arose before me today, and that relates to the fact that the Employment Judge had found (that is, in the liability hearing), on page 59 of the bundle at paragraph 16, that:

"..the claimant is not, in my judgment, entitled in 2011 to make a complaint about holiday pay for unused holiday entitlement in previous years."

10. That decision, which is essentially against the Claimant, was not appealed and so I do not regard it as before me today. My having explained that, Mr Shirazi sought leave to amend his grounds of appeal to include it and explained to me that it had been raised by the Respondent in the response he had put into the appeal. Mr Shirazi is correct to say that that matter had been raised, and in fact the Respondent lodged authorities which would go towards that area of dispute. Nevertheless I refused leave to appeal as I regard it as too late to introduce that matter at this stage.

11. It may be convenient to state at this stage in my Judgment that an argument about limitation was run in the Tribunal below, but no appeal on that question has been lodged, and so that matter is not before me either.

Holiday pay

12. The first question which is before me is what does a Judge do in an Employment Tribunal when there is a lack of evidence. Mr Shirazi in this case submits that the Employment Judge found, in the Judgment which he gave and which is found on page 2 of the bundle between paragraphs 4 and 9, that the evidence was unsatisfactory. While the Claimant included in his witness statement a schedule with payslips and while he said in oral evidence that he took at most ten holidays every year, the Employment Judge found the evidence unsatisfactory and found that he could not make any definite finding as to what holidays he had taken. He noted at paragraph 5 that the Claimant could not remember when he had taken holiday and did not have any records. He said that his wife did not remember either. The Claimant said that sometimes he had gone home to Romania for his holidays and at other times he had visited Italy and Spain. He said there was no particular time of the year in which he always took a holiday

13. When he gave evidence about the building industry Christmas closure, the Claimant said that the Respondent's sites did not always close for a full two weeks and it depended on management. He was, however, clear that he did not work on any Bank Holidays. The Employment Judge at paragraph 9 stated that he accepted the Claimant's evidence insofar as it went. Therefore he found him to be a credible person but he could not identify any days other than Bank Holidays on which he had taken holidays. The Employment Judge, correctly in my opinion, stated at paragraph 9 that the burden lies on the Claimant to prove his case.

14. He said that he could not say, on the balance of probabilities, that the Claimant took ten days' holiday and the site closed for, say, seven days, allowing three Bank Holidays at a time. The Employment Judge said that he was sure that the Claimant did take some holidays and that the site closed at Christmas time for at least part of two weeks, but he could not be precise about how much holiday the Claimant had taken. He finished paragraph 9 by saying that, in effect, the Claimant was asking him to make a guess and he did not consider that to be appropriate. He said that a guess is not a finding on the balance of probabilities.

15. Notwithstanding all that having been said by the Employment Judge, Mr Shirazi submitted before me that there was enough evidence which would have enabled the Judge to decide that the Claimant had taken about two weeks at Christmas time as holidays, part of which would be Bank Holidays. He said that was found in the oral evidence and in the paperwork which is now at page 19 and onwards of the bundle, being the Claimant's witness statement. That consists of a statement in which the Claimant says he took voluntarily at most ten days per year, and was not at work when he was told not to come, because the site was closed due to bad weather or otherwise. A list of days when he was not paid was produced and is said to have been taken from his payslips. Mr Shirazi argues that there is enough there for the Employment Judge to proceed and to make findings. He also argues that it is a matter of

some importance that the Employment Judge should deal with this evidence even if it not perfect, because Mr Shirazi argues that not to do so would enable employers to avoid making payment, because many people who are at work in the construction industry and no doubt elsewhere do not keep careful details of records of their holidays. And Mr Shirazi argues that if proper records are not kept by an employer, he should not be able to benefit from that failure to keep records. He also prays in aid the principle of effectiveness and reminds me that holiday pay is a right which derives from European law and that the principle of effectiveness requires that there is a remedy which people can reasonably use and which is not so difficult or inconvenient as to be illusory.

16. In my opinion, there is insufficient in this case to enable the Judge to know if the Claimant was not paid, from the list that was given, because he voluntarily took a holiday or because it was a Bank Holiday or because it was a site closure for whatever reason or because it was a bad weather closure. Therefore the Employment Judge was right when he said that he had no way of deciding what days were holidays other than the Bank Holidays, for which he did award payment.

17. Mr Shirazi submitted that the Judge should have made a finding on the balance of probability. I note that the Employment Judge used that phrase himself. It seems to me to have introduced a degree of confusion because two matters are being conflated. They are the burden of proof and the standard of proof. This case has nothing to do with the standard of proof, which is plainly that of proof on the balance of probabilities. No-one contends anything else. This case is concerned with the burden of proof, which rests on the Claimant. It is for him to discharge the burden by leading evidence, whether oral, documentary or a mixture of both.

18. To put that into concrete terms, in this case the Claimant should have been able, in my opinion, to lead at least some evidence of how long he had been away when he said he had been away when he said he went to Romania, Italy and Spain. While I would not expect everyone to keep detailed records, I would expect some effort to be made by checking diaries, bank statements, or other records, or simply by speaking to friends and relations to attempt to piece together time. It is apparent from the evidence that the Claimant must have spoken to his wife, because he did say in his witness statement that she did not know either. But he should have made more of an effort to piece it together somehow. One possibility would be if he was returning to Romania, which was his home, to speak to others whom he presumably visited in order to have some idea of how long he had been there. I have come quite clearly to the view that I cannot say that the Employment Judge erred in law when he decided that he was being invited to guess and I cannot say that he erred in law when he said that his function as a judge was not to guess but rather was to see whether or not the Claimant had discharged the burden of proof and to find that, apart from Bank Holidays, he had not done so.

The consequential loss claim

19. The second question before me relates to the consequential loss claim. That is not mentioned in the ET1, which was drawn up by the Claimant himself. But his drafting is, in my opinion, wide enough to encompass such a claim. Parties were aware of the claim, as the witness statement from the Claimant's wife, now at page 100 in the bundle, is concerned with nothing else. The skeleton argument for the Claimant at the remedy hearing mentions it and a Schedule of Loss, now at page 93 onwards, mentions it. Perhaps confusingly, the witness statement for the Claimant at the remedy hearing does not mention it, but it does have in it detailed calculations of the sums said to be due as holiday pay. I therefore have a good deal of sympathy for the Employment Judge if he was in some degree of confusion as to what was being claimed, because as I say there were some detailed calculations about holiday pay in the

witness statement and not a word about consequential loss, but nevertheless there was a schedule which contained the claim for consequential loss and there was the witness statement from the Claimant's wife which talked about nothing else.

20. Mr Davey opposed the submission that I should consider the claim of consequential loss and he stated that it was the duty of a representative appearing before a Tribunal to make sure that he addressed the Employment Judge on everything that he sought. Mr Davey argued that it was not enough to mention something in a skeleton argument or in a schedule. His argument was that one had to address the Judge.

21. I have come to the view that while it is clearly sensible that one makes sure that one addresses the Tribunal on all that one seeks to have in the Judgment, it was not in this case in accordance with justice that the claim is not considered. Mr Davey addressed me on remarks that he had heard recently in a speech made by Mummery LJ about the difficulties that can be caused by skeleton arguments and witness statements and of course I have every regard for what Mummery LJ says and respectfully agree with him that it can sometimes be difficult, because skeleton arguments are helpful but they can sometimes lead to an element of confusion about what is being pressed and what is not being pressed. Witness statements can have a similar difficulty, but in this particular case I am persuaded that the level of confusion about what happened at that remedy hearing is sufficient that the matter should be before me.

22. That being so, I take the view that this is a matter that can be decided by me and that there is no need to remit it. The reason for that is that the position on consequential loss is set out in the witness statement given by the Claimant's wife, which is at page 100. That witness statement was made known to the Respondent's representatives in the proper way and, while they did not have an opportunity to cross-examine because the witness was not put into the

witness box, they did know that she was there and if they wanted to argue with what she had said, they could presumably have asked to do so. Further, if they had any evidence of a positive nature that they wanted to lead about consequential loss, they could have produced a witness to speak to it, although it is hard to see what evidence they would have had, because they are not to know how the Claimant is to organise his finances. Therefore what I have before me is the witness statement of the Claimant's wife, without a contradictor. I should say that I do not accept Mr Davey's submission that it is necessary that the Claimant himself also gives evidence about this, because what the witness statement says, at paragraph 1 is as follows:

> **"I am the wife of Cornel Timbulas. We married on 15 August 2003. I deal with the family finances."**

The Claimant's wife then goes on to explain her position regarding the family finances in four short paragraphs, and it seems to me that that is evidence that, had the Tribunal properly considered it, they would have been entitled to regard as what happens to this family's finances. There is nothing inherently unbelievable about the idea that the Claimant's wife dealt with the finances, and it was not necessary for him to say so.

23. That being so, there is before me evidence from Mrs Timbulas, which says that they had a mortgage taken out on 18 July 2007 in joint names and that it was at a fixed rate for the first five years of 6.19% per annum compounded. At paragraph 4 she says that the bank sent a letter in July 2011 waiving the penalty which had existed for early repayment. She says that after that date, if they had had any extra money, they would have used it to pay off the mortgage.

24. As I understand the argument, Mr Shirazi says that the rate that ought to be given on the sums already awarded by the Employment Judge is 6.19% on the basis that the Claimant was out of that money during the time that he was not paid his holiday pay and that it was costing

him 6.l9% on his mortgage. He would, on the undisputed evidence, have put it towards the mortgage and therefore would not have been paying that percentage. That argument, however, does not give any regard to the facts of the matter, because, as was pointed out by Mr Davey, the early penalty provisions would have prevented money being paid into the mortgage from its inception until July 2011.

25. As I understood Mr Shirazi's fallback argument, he would seek 5% over base rate if he did not get 6.19% and, as I understood Mr Davey, if interest was to be awarded he would not quarrel with that latter interest rate of 5% over base. Mr Shirazi referred me to a very helpful High Court case, **Equitas v Walsham Brothers** [2013] EWHC 3264, at which the principles of payment of interest are set out. It does not seem to me necessary to discuss in any detail the principles of interest, because there is no dispute before me that the original idea of interest is that if a person is kept out of his money, then when he is awarded it he gets interest on it in order to make up for his having been kept out of it. That is a perhaps inelegant but simple exposition of the idea, and that I find to be the position.

26. The result of that is that I will make an order today that interest at 5% above base be paid on the sums which the Employment Judge has already awarded in respect of holiday pay.