Appeal Nos. UKEAT/0547/12/GE
UKEAT/0548/12/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 September 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

UKEAT/0547/12/GE

USDAW — APPELLANT

ETHEL AUSTIN LTD (IN ADMINISTRATION) — RESPONDENT

UKEAT/0548/12/GE

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(1) USDAW
(2) MRS B WILSON — APPELLANTS

(1) UNITE THE UNION
(2) WW REALISATION 1 LTD
(3) SECRETARY OF STATE FOR BUSINESS, INNOVATION & SKILLS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

DIRECTIONS HEARING

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APPEARANCES

For Secretary of State for BIS	MR TIM WARD (One of Her Majesty's Counsel) & MR DAVID BARR (of Counsel) Instructed by: Treasury Solicitors Department (E1 Employment Group) One Kemble Street London WC2B 4TS
For USDAW	MS DINAH ROSE (One of Her Majesty's Counsel) & MR IAIN STEELE (of Counsel) Instructed by: Slater & Gordon Solicitors 1st Floor St James House 7 Charlotte Street Manchester M1 4DZ
For Ethel Austin Ltd (In Administration)	No appearance or representation
For the First and Second Respondents under UKEAT/0548/12/GE	No appearance or representation

SUMMARY

PRACTICE AND PROCEDURE – Permission to appeal further

Permission to appeal was granted. The Secretary of State's apology for declining to attend hitherto was accepted. There was a compelling reason for permission, including a parallel reference to the CJEU, the importance of the legal issue to industry, and the value of the claims. In the unique circumstances, a condition of permission being granted was the Secretary of State indemnify the Claimants for their reasonable costs in the Court of Appeal.

HIS HONOUR JUDGE McMULLEN QC

1. This is an application for permission to appeal following the Judgment of a three-person EAT over which I presided on 30 May 2013 and for which a corrected Judgment was sealed on 8 July 2013 (UKEAT/0547/12 and UKEAT/0548/12). The application is made by the Secretary of State, who is appearing in this case for the first time, and he does so through Mr Tim Ward QC and Mr David Barr, whose written application for permission is before me. The Claimants continue to be represented by Ms Dinah Rose QC and Mr Iain Steele.

2. The constitution today is regulated by section 12 of the **Enterprise and Regulatory Reform Act 2013**. In fixing up this oral application, I caused a note to be sent to the parties indicating that it would be heard Judge alone. That is now the default position for proceedings that were not ongoing at the time the legislation was changed (25 June 2013). Ms Rose's position, when I ventilated this with the parties, was that the proceedings are in the default position, which is that the legislation now requires a hearing in the EAT to be conducted by a Judge alone, unless a Judge decides that it should be heard by three people. Mr Ward's position was that I did not have the power to do this, for the case is still ongoing. I prefer the argument of Ms Rose. The Judgment has been sealed; it is effective. In accordance with the normal rule about orders, proceedings could be taken by the Claimants to enforce their rights under it, subject to what I say later on, and this matter is now being considered under the aegis of the rules for permission to appeal to the Court of Appeal. And so, faithful to what I consider to be the policy reasons in the 2013 Act, this application, heard after the coming into effect of the legislation, is to be heard by a Judge alone, the application having been made on 22 July 2013.

3. The circumstances are in the unchallenged assertion of Ms Rose wholly unique. In her researches and her experience she has not found a case where a party has sought to enter into the Court of Appeal for the first time whilst declining expressly the invitation of the court below to attend. So I decided to have this case in open court so that the Secretary of State's first appearance could be heard by all.

4. At the outset of Mr Ward's submission, he addressed what he had put in writing, which is the following (paragraph 4 of his skeleton argument):

> **"The Secretary of State wishes to apologise to the EAT for the failure to participate in this case at an earlier stage. The issues raised by this appeal are of wide importance – far beyond the facts of these particular appeals. This was not appreciated prior to the handing down of the judgment of the EAT."**

5. He indeed went further and said that the Secretary of State put his hand up to this. He did, however, indicate that that failure by the Secretary of State to play any part in the proceedings below should not be treated as an opportunity for punishment, and I accept that. There were aspects of Ms Rose's submissions that indicated her client's strong criticism of the behaviour of the Secretary of State, but I am concerned with how this case should move forward, if at all, and not to visit the failure by the Secretary of State with penal measures.

6. The correct approach, as I reminded Mr Ward, has to begin with section 37(1) of the **Employment Tribunals Act 1996**, which requires permission to appeal from the EAT to the Court of Appeal either from the EAT or from the Court of Appeal, but in any event only on a question of law. As a matter of practice the EAT follows the CPR and will give permission where there is a compelling reason or where there are reasonable prospects of success, but the gateway to the jurisdiction is section 37(1).

7. Within the powers of the EAT also under section 31(3) is a power to stay an order of the EAT – that is, the EAT has a power to give any directions – but the general rule is an appeal does not suspend the enforcement of any order made. It is common ground before me that that use of the word "direction" includes, effectively, that an order of the EAT be stayed pending appeal, but in any event it can be made a condition.

8. The application is in two parts. First, there is a detailed exegesis of the legal grounds upon which the attack is made upon the EAT Judgment and seeking to uphold the Judgment of the two Employment Tribunals below; essentially, they are to do with the construction of the domestic and the European legislation. Secondly, there is the intervention of the Belfast Industrial Tribunal under Judge Buggy for the second time in our proceedings. In the first, it was indicated to us at the hearing that there was a Judgment of his Tribunal in relation to **Woolworths** but that the precise point before us was not the same as before him, and in any event his Tribunal was not asked or not to make a reference to the CJEU. In the second case there is a reference by Judge Buggy in the case of **Lyttle v Bluebird UK Bidco Ltd** C-182/13 NIIT to the CJEU.

9. It has caught this court and Ms Rose by surprise, because, as she very fairly says, the reference was made by the Belfast Industrial Tribunal upon legislation equivalent to the British legislation and it was known within the Department of State prior to the appeal coming on before us. As we recorded in our Judgment, both the Claimants and the EAT invited the Secretary of State to take part. Ms Rose makes the point, new before me today, in the light of the information given, that the Secretary of State knew about this reference, and she is right to

do that, because when this application came before me I did cause a question to be raised of Ms Rose as to why this was not drawn to our attention at the hearing, and she has answered it perfectly correctly; she did not know. The Secretary of State knew prior to this appeal being opened in the EAT.

10. The arguments of Mr Ward and Mr Barr are that there is a compelling reason for this case to go to the Court of Appeal based upon the authoritative interpretation to be given to it either by the CJEU or by the Court of Appeal. Initially, his approach was that the case should go to the Court of Appeal, the Court of Appeal would then receive an application from the Secretary of State for a stay behind **Lyttle**, and then the Court of Appeal could decide what to do about it.

11. It seems to me the intervention of **Lyttle** into these proceedings is relevant. I do not know what would have been the position of the Claimants had they known that, nor do I know what our position would be had we known it at the appeal, but it is relevant that the CJEU is now seised of an issue that is potentially determinative to this case. It is most unfortunate that it has happened in this way. As a matter of record, the Liverpool and the London Tribunals did not see it necessary for the interpretation of the provisions to refer the matter to the CJEU, nor did the EAT, and, as I say, I cannot be sure what would have been the outcome had that case been known to us before. It should have been; it was a relevant factor. Why? One has only to look at the application for me today, which writes this case up in big letters as a relevant factor.

12. The permission to appeal application, if it were to be the grounds of appeal, covers much of the territory that Ms Rose generously and professionally put before us as being arguments that could potentially have been raised had the Secretary of State shown up, except for one,

which is the archaeology of the phrase "one establishment". This Mr Ward points out goes back to 1975 and was not drawn to our attention. There can be no criticism of Ms Rose for failing to raise that.

13. The value of these claims is also relevant. But the points upon which the orders are made are ones of interpretation, which, in my judgment, point towards giving permission to appeal. There is a reasonable prospect of success before the Court of Appeal in some of the points that the Secretary of State now seeks to raise, but of more importance is the second strand, which is the compelling reason. There is no doubt that our Judgment has made a substantial change in the outlook to this legislation, and it is in the interests of all that this issue be clarified as soon as possible. I will give permission to appeal and at the same time bear in mind that I have the power to impose conditions.

14. All parties before me accept that there is a very wide power, in accordance with the CPR, to impose conditions. I have been taken to the new regime under which appeals to the Court of Appeal from a no-costs environment such as the EAT have been dealt with; see **Eweida v British Airways** [2009] EWCA Civ 1025, where there is reiteration of the **R (Corner House Research) v Secretary of State for Trade and Industry** [2005] EWCA Civ 192 principles, which are restated as follows:

> **"1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:**
>
> **i) The issues raised are of general public importance;**
>
> **ii) The public interest requires that those issues should be resolved;**
>
> **iii) The applicant has no private interest in the outcome of the case;**
>
> **iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;**

> **v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.**
>
> **2. If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.**
>
> **3. It is for the court, in its discretion, to decide whether it is fair and just to make an order in the light of the considerations set out above."**

15. The new regime was heralded in by Jackson LJ in **Manchester College v Hazel** [2013] EWCA Civ 281 when considering an application by the Respondent who had failed at the ET and before me at the EAT for permission to appeal. Jackson LJ set out the provisions relating to costs shifting, and relevant to this consideration is what he said at paragraphs 30 and 31:

> **"30. The outcome of *Eweida*, although correct on the law as it stood, was unsatisfactory for a number of reasons. Many individuals of modest means who litigate in 'no costs' jurisdictions are often without legal representation. Indeed, the claimants in this case litigated before the Ashford Employment Tribunal without representation. It is usually unjust to subject such litigants to a risk of adverse costs when they proceed to a higher level. This is particularly so if they win at first instance and are dragged unwillingly into an appeal. It may also be unjust to impose a costs risk if the litigant loses at first instance, but has proper grounds for bringing an appeal. This was the case with Mrs Eweida.**
>
> **31. Of course it is not always desirable to suspend costs shifting rules when a case comes up from a 'no costs' jurisdiction. A classic example is an appeal from the EAT where one party is a well resourced employer and the other party is an employee or a group of employees backed by their union. Such a case may well involve issues of principle or practice on which substantial sums turn. Obviously, in cases like that, there is no reason to disapply the normal costs shifting rules."**

That reflects the change that followed his report and there is then set out in paragraph 32 to the relevant conditions in a costs-shifting jurisdiction.

16. I pay attention to the factors in **Corner House**, but I accept Ms Rose's submission that essentially what I am dealing with here is not protection of costs in a costs-shifting environment, which classically the move from the EAT to the Court of Appeal is, but as to conditional permission given traditionally by an inferior court when considering an application to the Court of Appeal.

17. My attention has been drawn to **Ungi v Liverpool City Council** [2004] EWCA Civ 1617 and **Days Medical Aids Ltd v Pihsiang Mechanical Manufacturing Co Ltd** [2004] EWCA Civ 993 (see page 1,729 of the current *White Book*) and, in my judgment, conditions can be imposed of the kind that are sought in part by the Claimants. The reason why I am considering conditions is the unique circumstances of this case. They include the following. The Secretary of State is a party to the **Woolworths** case; he entered an appearance, I think, but did not appear in the ET or the EAT, despite being invited to do so. We do not know what influence submissions of the kind made by Mr Ward and Mr Barr today would have made, but it plainly was, as the fulsome apology given and accepted today indicate, a mistake not to come here and argue these points. The points will now have to be developed at another stage. This litigation is dependent on other litigation. One does not know what will happen to **Lyttle** – it might be compromised – but there is further delay and uncertainty. I will of course accept from Ms Rose that this is an unusual, if not unique, situation. Not only are new points sought to be argued – that is despite Ms Rose's deputising for the hypothetical counsel for the Secretary of State – but also in the applications today there are new points that were not raised below. On that ground alone, and similarly on the failure to respond correctly to the invitation from the EAT to take part in the proceedings, a condition in relation to the indemnity in costs can be given.

18. This was a wasted opportunity. This matter could have been dealt with by a full hearing; it could have been the subject of an application for a reference to the CJEU. Ms Rose realistically does not seek to revisit any question of her clients' costs in the EAT thus far, and so we are looking forward. The Secretary of State has at the same time as offering his apology made a clear open offer that if the Secretary of State succeeds at some stage in the Court of Appeal, he will not seek his costs from the Claimants. That of course, in my judgment, is a

highly responsible position for the Secretary of State to adopt. But the Secretary of State has issues to raise here, partly of a private nature in relation to the Claimants in that he is the guardian of the public fund, and I think this is the National Insurance Fund, which would ultimately pay out the Claimants in the excluded groups should they continue to uphold the order of the EAT. But he also has, as his application expressly makes clear, the wider interests in seeking clarity in the law and a definitive interpretation for other cases, being, it seems to me, an important issue where there are, in times of austerity, many redundancies and liquidations and the law should be clarified. He has an interest in that. And so there is a very strong impact in his thinking of a public nature, and the Claimants and their union are Respondents to this appeal, seeking to hold on to the correctness of a Judgment of the EAT.

19. For those reasons, then, it is correct for me to exercise discretion and impose a condition that the Claimant's costs be indemnified on a standard basis in the Court of Appeal. I indicated to Mr Ward that there is a precedent for this: **Secretary of State for Employment v Spence** [1986] ICR 651, where the order of the court on the Secretary of State's appeal failing was that he should pay the claimant's costs, but, as I recall, the Secretary of State had given a prior indemnity to Thompson's, who were conducting the response to the appeal.

20. I then turn to the other aspects of the conditions that are sought. Ms Rose seeks to avoid the Secretary of State making an application to stay the order. The basis upon which she does that is hand in hand with an application she makes that the money should be paid and the Secretary of State should indemnify the individual Claimants if protective awards are made and found to have been made wrongly as a result of the outcome of either this case or the **Lyttle** case. In my judgment, that goes far too far. There certainly is no precedent for that being done,

and the justice of the case is simply in relation to the costs. Ms Rose argues in writing that it is grossly unfair for anybody who is being paid now, on the footing that the EAT order remains in place, to have to give back the money. I do not agree. It would be grossly unfair for someone who was not entitled to eight weeks' money to be able to keep it, and so I reject that contention. I will impose a stay on the EAT's order pending the appeal, but there will be liberty to apply to the Court of Appeal in relation to that aspect.

21. So, permission to appeal is granted, on condition that the Secretary of State reinforce his offer of indemnifying the Claimants against an award in his favour and that he pay the reasonable costs of the Claimants in responding to the appeal in the Court of Appeal, on the standard basis.

22. There is one other matter. I have treated both the appeals as one. This is because HHJ Peter Clark made an order saying the two appeals would be heard together. Technically, the Secretary of State was not a party at first instance to the Ethel Austin appeal. Mr Barr, who argued this part of the case, referred me to CPR 52.1.3 and the definition of a person who is an appellant. The dispute here is that the Secretary of State cannot be an appellant from a decision in which he played no part at first instance, for that is over. But, in my judgment, he is right when he cites **MA Holdings Ltd v George Wimpey UK Ltd** [2008] EWCA Civ 12, and I have given the opportunity for the parties to seek a review of this aspect of the Judgment if on further research the proposition advanced by Mr Barr is untenable. But I take a different approach in any event, which is that the cases were heard together in this court; no separate reliance was placed on the absence of the Secretary of State below in the Ethel Austin case, and indeed, in Ms Rose's submissions on the public-law aspects and the interpretative tools before me, the fact

that the Secretary of State will be responsible for protective awards on the insolvency of Ethel Austin was a major feature. So, just as a matter of practicality, it would be wrong to separate the two appeals and to exclude the Secretary of State from one. If there were doubt about that, then I would exercise my discretion and say that as a further condition of permission being granted the two appeals be heard together; that is, that they are joined, so that the Secretary of State is a full party to the Ethel Austin appeal.