Appeal No. UKEAT/0115/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 July 2013

Before

HIS HONOUR JUDGE SHANKS

MR M CLANCY

MRS A GALLICO

MR A AHMED — APPELLANT

WINCANTON GROUP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR HAMID SAID (Representative)
For the Respondent	MR ADAM SAMUEL (of Counsel) Instructed by: Hill Dickinson LLP 1 St Paul's Square Liverpool L3 9ST

SUMMARY

CONTRACTOF EMPLOYMENT – Whether established

The Employment Tribunal found, on the basis of the opening words of a written contract between the parties, that the Claimant was not an employee. Counsel for the Respondent had not drawn the Tribunal's attention to the **Autoclenz** case [2011] UKSC 41 and the Tribunal had not carried out a proper analysis of all the terms of the written contract or how the parties operated it in practice and what the true agreement between the parties was. Appeal allowed and the matter remitted to new Employment Tribunal.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Claimant, Mr Ahmed, against a decision of the Employment Tribunal sitting at Bedford, which was sent to the parties on 22 November 2012. The Claimant is represented today by a friend, Mr Said, who also represented him below in the Employment Tribunal. Mr Said is not a lawyer and does not claim any special expertise. The Respondent is represented today by Mr Samuel of counsel, who also represented the Respondent below in the Employment Tribunal. The Tribunal decided that the Claimant was not an employee of the Respondent for the purposes of section 230 of the **Employment Rights Act**, which meant that the Employment Tribunal dismissed his claim for unfair dismissal. The only evidence that was presented to the Tribunal on this issue was that from Mr Ahmed himself; the Respondent did not put forward any evidence at all.

2. The Claimant had also made a claim for race discrimination arising out of the same incident that led to him ceasing to work for the Respondent, and that was heard on its merits and dismissed on the facts. We have had a quick look at the Judgment in that case, which was in fact sent to the parties on 23 April 2013, but we stress the appeal relates only to the unfair dismissal claim and the question of employment status.

3. The background is that the Claimant worked for the Respondent as an operative in the Sainsbury's depot in Northampton from 26 September 2010 to 18 April 2012. On that date he was sent home following an incident, which is the same incident that he alleged involved race discrimination. He was sent home, according to the Judgment in the race discrimination part of the claim, having been "suspended".

4. At the outset of his employment he was given, according to the Employment Tribunal's decision, a document that contained, as they said, the operative terms of the contract between him and the Respondent, and that document is to be found at page 33 in our bundle. It is headed, "Wincanton Retail Solutions Labour Management Contract Terms of Engagement", and the opening words, in bold, say this:

> **"This agreement contains details of the terms of your engagement as a Retail Solutions worker. Please note that the terms of this agreement are not intended to create a contract of employment between yourself and the Company. The Company is under no obligation to offer you work assignments under this agreement, nor are you under any obligation to accept any work assignments that are offered to you. IF you do accept a work assignment offered to you by the Company, however, then you will be deemed to be an employee during the period of the assignment and the following terms will apply […]."**

5. It is not particularly material today, but it is worth noting some of the other terms that are to be found in this document. There is provision for the "Date of Commencement of employment", which was 26 September 2010. There is a provision that says, "No period of employment with a previous employer counts as part of your continuous employment". There is a provision for a probationary period that says, "All new workers are required to serve a probationary period of up to 13 weeks with the Company", and there is provision for that to be extended by 12 weeks. There is a provision that says, "Whilst within the probationary period the notice period to be given by either party is one week". There is then provision for hours of work:

> **"(a) […] the normal hours of work in this position for the purposes of calculating your pro rata entitlements are 40 per week (excluding meal breaks). […]**
>
> **(b) The working week shall consist of any 4 or 5 shifts from 7 days […]."**

There is provision for overtime:

> **"(d) The operational requirements of the company are such that at certain times it may be necessary for you to work in excess of your normal working week."**

There is then a provision that says the **Working Time Regulations** apply. On page 3 there is a provision that says, "Your annual holiday entitlement is 28 days", which accrues on a monthly pro rata basis, and there is provision that says,

> **"The Company reserves the right to nominate up to five days of an employees' [sic] annual holiday entitlement in any holiday year."**

Then the next paragraph says:

> **"Team Members are requested to notify their immediate Superior of their Summer holiday requirements before 1 March. If this notification is not forthcoming, holiday weeks will be assigned by the Department Manager on the basis of weeks which are still available. At least 2 weeks notice [sic] of other holidays must be given to the workers [sic] immediate Superior."**

And there is a provision that no more than two weeks may be taken together without the general manager's permission and no more than two weeks may be taken during June to September. There is provision in relation to public holidays at page 4:

> **"Bank Holidays and public holidays are deemed normal working days to be worked as required by the Company. Annual holiday entitlement takes account of this […]."**

There is provision for a company sickness policy with statutory sick pay, there is provision for a pension, there is provision for a grievance procedure, and there is provision for the disciplinary code procedure. There is then provision for termination of employment, which requires the company to give after two years or more of continuous service 1 week for each year of service with a maximum of 12, and from the worker 1 week's notice after 4 weeks' continuous service. On that page there is also a provision that the agreement will terminate automatically if the worker has either not been offered or has not accepted an assignment from the company for a period of three months, and there is provision that:

> **"You are free to carry out work for other companies and organizations during your engagement […] save for period during which you have agreed to carry out an assignment for**

> **the Company or are on a period of agreed statutory or annual leave. We do require you, however, to notify us** [in relation to Working Time Regulations]**."**

That is a summary of the document that was said to encapsulate the terms on which the Claimant was working.

6. So far as the decision of the Tribunal is concerned, it is quite brief, and there is very little factual analysis and very little analysis of the contractual terms that are mentioned. So far as factual analysis is concerned, the Tribunal said this:

> **"1. […] the Claimant accepts he was given this contract** [the document referred to above] **at the start of his engagement or service with the Respondent, those are the terms in law under which he operated.**
>
> **2. In this first paragraph of his own witness statement, which he has given to the Tribunal today evidence on affirmation, he states as follows, it's a short paragraph which I will quote:**
>
> > **'I started my employment with Wincanton at Swan Valley, Northampton on 26/09/2010. My current role was hygiene operative. My shift pattern was Saturday to Wednesday starting 6 am to 2 pm. I have been offered this shift since September 2011.'**
>
> **The Claimant was unclear in his evidence, perhaps it was a matter of memory, as to quite what the situation was in the first year of his employment but, certainly on 18 April 2012 following an incident at work, he was told to go home and no further engagements were offered to him for some considerable while, if at all."**

That was really the limit of findings of fact in relation to how his work operated.

7. In paragraph 3 the Tribunal mentioned three cases that they had been referred to by counsel for the Respondent: **Carmichael v National Power PLC** [1999] UKHL 47; **Clark v Oxfordshire Health Authority** [1998] IRLR 125; and **Stevedoring & Haulage Services v Fuller and Ors** [2001] EWCA Civ 651. There was no reference, surprisingly, to the Supreme Court case of **Autoclenz v Belcher & Ors** [2011] UKSC 41. In paragraph 4 the Tribunal said this:

> **"It has been argued by Mr Said, on behalf of the Claimant, that the fact there was a rota which, he proposed, was for six months or more, meant the Claimant had no choice but to work all of those rotas. Well, it was weekly rota, people generally like to know what they are going to do in advance and managers like to plan their work arrangements, but there is nothing in that that suggests to this panel that the Claimant was unable, should he have felt like it, simply to have said, presumably giving some reasonable notice as a matter of courtesy, I don't want to work next week, I'm not coming in. On the evidence we have this case falls squarely within the authorities referred to by Counsel […]."**

Then they go on to say that he is not an employee within the terms of section 230.

8. The law we deal with very briefly, because it is encapsulated now in the **Autoclenz** decision. At paragraph 29 Lord Clarke, having gone through a number of authorities, says this:

> **"However, the question for this court is not whether the two approaches are consistent but what is the correct principle. I unhesitatingly prefer the approach of Elias J in [*Consistent Group Ltd v*] *Kalwak* [[2007] IRLR 560] and of the Court of Appeal in [*Protectacoat Firthglow Ltd v*] *Szilagyi* [[2009] IRLR 365], and in this case to that of the Court of Appeal in *Kalwak*. The question in every case is, as Aikens LJ put it in [2010] IRLR 70 para 88 quoted above, what was the true agreement between the parties."**

And, referring back to his paragraph 25, he quotes Elias J in **Kalwak** at paragraphs 57-59 in the report of that case:

> **"57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He says this (p697):**
>
> > **'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligation. If the obligation is a sham, it will want to say so.'**
>
> **58. In other words, if the reality of the situation is that no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.**
>
> **59. Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance."**

9. The course of this appeal is that there were what are often called "homemade" grounds of appeal presented by the Claimant. In those grounds there is mention of the case of **Autoclenz**,

and there is also a suggestion that, regardless of the nature of the umbrella contract, there was in fact continuity between weeks of actual work such that those weeks would provide sufficient continuity of employment to give rise to the right to make a claim for unfair dismissal. That point apparently was not expressly run in front of the Employment Tribunal.

10. At the outset of the hearing today, given the apparent inadequacies in the Judgment and the preliminary view that I had formed in the light of the terms of the written agreement itself, I invited counsel for the Respondent, in effect, to go first. I asked him if **Autoclenz** had been cited to the Employment Tribunal, and he told me it had not. I then focused with counsel on the opening words of the contract to which I have referred, which say that if a "work assignment" offered by the Company is accepted, then the worker will be deemed to be an employee during the period of the assignment, and then the terms following would apply. I asked what I thought might be a fairly straightforward question as to what on the Respondent's case an assignment entailed: was it just the shift, was it the week, was it the period of the forthcoming rota, or some other period, and what was the factual position underlying that? Counsel was either unwilling or unable to say what the Respondent's case was about this either on the specific facts of this case or in general.

11. At that point in the proceedings the Tribunal rose to review the position. We were very troubled by the approach being taken by the Respondent through their counsel, and we returned to the hearing and told counsel that we were of the view that, given that **Autoclenz** had not been cited, and that the Employment Tribunal appeared not to have made sufficient factual enquiries or findings or to have analysed the terms of the contract, we were of the view that, subject to anything further he might say, the case really ought to be remitted to a different Employment Tribunal to rehear the whole issue. Mr Samuel, although invited to make further

submissions if he wished, then in effect conceded the appeal without making further submissions.

12. Mr Said then sought to argue that we should ourselves decide the employment status issue today and drew our attention to the relevant section of the Employment Tribunals Act. However, although one or more of us have strong views as to what the right answer might be, we agreed that we were simply not in a position to substitute a conclusion for that of the Employment Tribunal without full and clear factual findings on which to base such a conclusion.

13. It follows that the appeal must be allowed but the matter remitted to a differently constituted Employment Tribunal to consider the whole unfair dismissal claim again from scratch.