Appeal No. UKEAT/0288/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 June 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MR T HAYWOOD

PROFESSOR K C MOHANTY JP

MR W LIPINSKI APPELLANT

EBBSFLEET AUTOSPRAY CENTRE LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NAOMI CUNNINGHAM (of Counsel) Direct Public Access Scheme
For the Respondent	MR AMRICK HALAITH (Representative)

SUMMARY

UNFAIR DISMISSAL – Exclusions including worker/jurisdiction

The issue to be determined was whether the Employment Tribunal erred in failing to hold that the Claimant's continuity of employment was preserved by operation of the **Employment Protection (Continuity of Employment) Regulations 1996** between the date of his dismissal and his reinstatement. It was held that for such continuity to be preserved three elements must be present: (1) the employee was dismissed by the Respondent; (2) he has presented a relevant complaint of dismissal; and (3) that in consequence of presenting such a relevant complaint he is reinstated or re-engaged. The presentation of a complaint of unfair dismissal to an Employment Tribunal which is related to the reinstatement or re-engagement is a "relevant complaint of dismissal" within the meaning of Regulation 219(2)(b). This is the natural meaning of the words and does not depend on the extended definition of "relevant complaint of dismissal" in the now repealed ERA section 219(3). It was not necessary to determine whether complaints of discrimination by dismissal which were previously included in the now repealed definition are still to be regarded as "a relevant complaint of dismissal". Matter remitted to the ET to determine whether the Claimant was reinstated in consequence of bringing a complaint of unfair dismissal.

THE HONOURABLE MRS JUSTICE SLADE DBE

Introduction

1. Mr Lipinski, the Claimant, appeals from the Judgment of an Employment Tribunal sent to the parties on 20 March 2012 that he failed to establish that he was continuously employed by the Respondent, Ebbsfleet Autospray Centre Ltd, for at least one year ending with his dismissal on 20 May 2011 and accordingly he did not have the right to present a complaint of unfair dismissal to an Employment Tribunal. References below to paragraph numbers are to those in the Judgment of the Employment Tribunal unless otherwise indicated. The appeal turns on whether the Employment Tribunal erred in holding that there was a break in the continuity of the Claimant's employment between 26 March 2010 and 19 July 2010. Following a preliminary hearing, HHJ McMullen QC permitted the appeal to proceed on two grounds. Ms Cunningham, in her helpful skeleton argument and today before us, has confirmed that the appeal is proceeding on one ground only, and that is that the Tribunal had failed to consider whether Regulation 3(2) of the **Employment Protection (Continuity of Employment) Regulations 1996** ('the Regulations') had the effect of preserving the Claimant's continuity of employment.

The facts

2. The Employment Tribunal made the following findings of fact. Mr Lipinski first began work for the company on 3 October 2006. He was dismissed for the first time on 11 July 2008. He was hired by the company again on 3 December 2008. His employment ceased when he was dismissed on 25 March 2010. Mr Lipinski then presented a claim to the Tribunal against the company. Mr Lipinski began working for Nationwide Crash Centre in April 2010. He continued working for them until early July in 2010. Before the date on which Mr Lipinski's

claim against the Respondent was due to be heard, the case was settled by him. The signed settlement agreement is in the bundle dated 23 July 2010 and reads:

> **"We have re-employed Mr Lipinski on a permanent basis. We are both in agreement of the following payment:**
>
> **1 Holiday pay;**
>
> **2 Notice of pay [sic];**
>
> **3 Arrears of pay, other payments."**

3. On the same date Mr Lipinski wrote to the Tribunal stating that he wished to withdraw his claim as, "I have reached a settlement outside of court". Mr Lipinski's employment recommenced on 19 July 2010. On 18 January 2011 Mr Lipinski and Mr Halaith (on behalf of the company) signed a written statement of main terms and conditions of employment. This stated that his employment commenced on 19 June 2010. Mr Lipinski brought to the attention of the company that this date should read 19 July 2010, but it was not amended. On 20 May 2011 Mr Lipinski was dismissed by the company. The letter stated:

> **"It is with regret that we must terminate your contract as of immediate effect. We can confirm that the reason is reduction in the type of work that you specialise in."**

The letter went on to state that he was being paid one week's notice and any outstanding holiday entitlement.

The conclusion of the Employment Tribunal on the claim for unfair dismissal

4. The Tribunal looked at the question of whether Mr Lipinski had been continuously employed for one year. They held:

> **"20. […] We determined that he was not employed by the company during the period 25 March 2010 to 19 July 2010. In coming to that conclusion, we took into account Mr Lipinski's evidence, and also the documents before us. Those documents included the agreement signed by the parties on 23 July 2010 and the statement of terms and conditions signed by the parties on 18 January 2011.**

21. The onus is on Mr Lipinski to establish continuous employment of one year or more. He failed to do so. It follows that the Tribunal is unable to hear his claim since he did not have the right not to be unfairly dismissed.

22. The claim for unfair dismissal therefore fails."

The relevant statutory provisions

5. **Employment Rights Act 1996** ('ERA') section 94 (the right to claim unfair dismissal) does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination. Sections 210(1), (4) and (5) and 212(1) provide for the computation of continuous employment. Section 219(1) provides as follows:

"Regulations made by the Secretary of State may make provision—

(a) for preserving the continuity of a person's period of employment for the purposes of this chapter as applied by, or under any other, enactment specified in the Regulations."

6. Section 219 was amended in 1998. Section 219(2) included the following:

"This subsection applies to any action taken in relation to the dismissal of an employee which consists of—

[…] (b) the presentation by him of a relevant complaint of dismissal […]."

7. Subsection (3) provides:

"In subsection 2(b), "relevant complaint of dismissal" means—

(a) a complaint under section 111 of this Act;

(b) a complaint under section 63 of the Sex Discrimination Act 1975 arising out of a dismissal;

(c) a complaint under section 54 of the Race Relations Act 1976 arising out of a dismissal; or

(d) a complaint under section 8 of the Disability Discrimination Act 1995 arising out of a dismissal."

8. The Regulations provide, in material part, as follows:

> **"2. These regulations apply to any action taken in relation to the dismissal of an employee which consists of—**
>
> **[…] (b) the presentation by him of a relevant complaint of dismissal […]**
>
> **[…] (d) the making of a relevant compromise contract […]."**

9. Regulation 3 provides:

> **"(1) The provisions of this Regulation shall have effect to preserve the continuity of a person's period of employment for the purposes of—**
>
> **(a) Chapter 1 of Part IV of the Employment Rights Act (continuous employment) […].**
>
> **(2) If in consequence of any action to which these Regulations apply a dismissed employee is reinstated or re-employed by his employer or by a successor or associated employer of that employer—**
>
> **(a) the continuity of that employee's period of employment shall be preserved, and**
>
> **(b) the period beginning with the date on which the dismissal takes effect and ending with the date of reinstatement or re-engagement shall count in the computation of the employee's period of continuous employment."**

The submissions of the parties

10. Ms Cunningham, for the Claimant, submits that the Employment Tribunal erred in failing to consider and apply the Regulations. Whilst the parties' lay representatives had not referred the Employment Tribunal to the Regulations, their application affected the jurisdiction of the Employment Tribunal to entertain the Claimant's complaints, and the Employment Appeal Tribunal has permitted the point to be taken on appeal. ERA section 219 is the enabling provision pursuant to which the Regulations were introduced. At the time of their introduction the term "relevant complaint of unfair dismissal" in subsection (2)(b) was defined in section 219(3) as set out above. Although subsections (2) to (4) were repealed by the **Employment Rights Disputes Resolution Act 1998**, Ms Cunningham contended that the meaning of "relevant complaint of dismissal" is still the repealed words of section 219. It is submitted that if the absence of a current statutory definition of "relevant complaint of dismissal" were to render Regulation 3(2) of the Regulations ineffective so far as it concerns

re-employment in consequence of an unfair dismissal complaint, the amendment would have an effect directly opposed to that intended. Ms Cunningham contends that the purpose of the repeal of the definition provision is to broaden the Secretary of State's power to provide for the preservation of continuity. She submitted that it is clear from paragraph 11 of the Judgment of the Employment Tribunal that the Claimant was re-employed in consequence of his presentation of a complaint of unfair dismissal, therefore Regulation 3(2) of the Regulations operates to preserve the continuity of his employment.

11. Mr Halaith, for the Respondent, contended that the Claimant had been employed on a permanent basis by another employer and he had been dismissed by that employer on 8 July 2010. He then approached the Respondent on 20 July 2010 and asked for his job back. So it came about, it was said, that the Claimant was re-employed and taken on again. Mr Halaith, who is a lay representative, in his very cogent submissions very frankly and understandably says that because he is not a lawyer he could not make detailed submissions on the Regulations, but as a matter of common sense where an employee, as this employee, ceased being employed by the Respondent and became employed by another employer the Claimant should not be regarded as being continuously employed by the Respondent whilst he was working for another employer.

12. Further, Mr Halaith makes very valid points on matters that have been of serious concern to this Employment Appeal Tribunal: the absence of key documents from the bundle presented to this Employment Appeal Tribunal. For example, there is not included in our bundle the ET1 complaint first presented to the Employment Tribunal as a result of which it is said the Claimant was re-engaged and re-employed, therefore triggering the entitlement to continuity of employment under the Regulations. It is a key element in what a Claimant has to establish

under the Regulations to show that they made a relevant complaint. Even if all the submissions made on the law are correct, there was not at first the material in this bundle to show that a complaint of unfair dismissal had been made by the Claimant, although there is tangential reference in the Employment Tribunal's decision to the sequential turn of events of making a complaint and then the Claimant being re-employed. However, after questions were asked by this Employment Appeal Tribunal, documents were provided to us. The material parts of the documents show as follows: that on 26 April 2010 in a letter from the Employment Tribunal office there had been an acknowledgement of the claim which had given a claim number. The letter addressed to the Claimant stated:

> **"Your claim of unfair dismissal, race discrimination, breach of contract, unlawful deduction of wages and unpaid holiday pay has been accepted. It has been given the above case number."**

13. There is also a Respondent's ET3 notice in response to the claim stamped 21 May 2010 referring to a period of employment of the Claimant which ended on 26 March 2010 and to the fact that the Respondent was then maintaining that the Claimant was dismissed for misconduct. What was also produced in the course of the hearing before us was a letter from the Respondent dated 23 July 2010 to the Claimant:

> **"We have re-employed Mr Lipinski on a permanent basis. We are both in agreement of the following payment:**
>
> **1 Holiday pay;**
>
> **2 Notice of pay [sic];**
>
> **3 Arrears of pay, other payments."**

14. Again, on enquiry as to what happened to the original 2010 claim on the basis that such was made, we were shown a document from the Employment Tribunal headed "Withdrawal of Claim" which stated, "Thank you for informing the Tribunal that you have withdrawn your

claim. I have therefore closed the file", and that the file would be retained until 18 August and then destroyed.

15. Having been provided with that material Mr Halaith is somewhat understandably concerned that he had not been provided with all necessary information. He explained the difficult position that he was in because his uncle was the guiding light in the Respondent and he has now sadly died. Mr Halaith was not in a position to really make any informed contribution on the contentions of fact made.

Discussion and conclusion

16. The Employment Tribunal was not referred to the Regulations. It is likely that the lay representatives of the parties appearing before the Employment Tribunal also did not refer to them. There are three elements to be established by a Claimant if he is to bring himself within the scope of the Regulations to maintain continuity of employment. First, what has to be shown is that the Claimant has been dismissed by the Respondent; secondly, that the Claimant has presented a relevant complaint of dismissal; and thirdly, that in consequence of presenting such a relevant complaint the dismissed employee is reinstated or re-engaged by his employer. If all those elements are satisfied, then the Regulations preserve the continuity of the Claimant's employment between the original dismissal and the date of reinstatement or re-engagement.

17. "Relevant complaint of dismissal" in Regulation 2(b) was defined in the repealed section 219(3)(a) as a complaint under section 111 of the ERA. The definition section also included the other complaints that we have set out. Those were complaints of discrimination arising out of a dismissal under three Acts. Section 219(1) is the enabling provision for the introduction of the Regulations. In our judgment, it must follow that absent any contrary

provision, whilst in place the definition in the enabling legislation applies to the Regulations. Therefore before the repeal of the material parts of section 219, a "relevant complaint of dismissal" included a claim for unfair dismissal under the ERA. Does the repeal of section 219(3) alter the position? What now is the meaning of "presentation of a relevant complaint of dismissal"? There is no new definition. A claim of unfair dismissal is commenced by a complaint to an Employment Tribunal. In our judgment, a complaint of unfair dismissal is plainly a complaint of dismissal. In context, in our judgment, "relevant" means a complaint of unfair dismissal. The "action" in relation to dismissal is the presentation of an ET1. This interpretation requires no special definition. ERA section 219 also included before the amendment complaints of sex discrimination, race discrimination and disability discrimination arising out of dismissal. It may be said that without the extended definition which had been in section 219, complaints of discrimination are not on their ordinary meaning complaints of dismissal. However, it is not necessary to determine that issue in this appeal, because in our judgment a complaint of unfair dismissal is plainly a "complaint of dismissal". The complaint of dismissal in context where what is complained about is the dismissal that is reversed by the reinstatement or re-engagement is a relevant complaint. A complaint of dismissal that ultimately leads to reinstatement is a relevant complaint within the meaning of the Regulations.

18. Does engagement by another employer negate the effect of Regulation 3? Regulation 3 makes no such provision. We accept that the construction which we have outlined would have the consequence that whilst a dismissed employee has accepted employment with a new employer, if he is reinstated or re-engaged as a result of bringing a complaint to an Employment Tribunal in respect of his dismissal by his first employer, his continuity of employment with that first employer would be maintained. Mr Halaith – and no doubt others – is understandably

puzzled by this consequence, which seems to him to be contrary to commonsense. However, it is the effect of the Regulations.

19. However, the Regulations do not have this effect where the employee has not been dismissed by the original employer but left, been employed by another employer and then taken on again after a period of time whether working for another employer or not working at all. Nor would the Regulations apply where the employee was dismissed but the reinstatement or re-engagement was not as a result of his bringing a claim for unfair dismissal. However, in this case, in our judgment, on the material that has now been produced to us, it is clear that the Claimant was dismissed; that is the position taken by the Respondent in the ET3 that has now been produced to us. Further, it is clear that the Claimant brought a claim of unfair dismissal arising from his dismissal on 26 March 2010. It is regrettable that evidence of this key element in the step of reasoning, namely the ET1, is absent from the material placed before us. However, we consider that the acknowledgement by the Employment Tribunal, of a claim made by the Claimant of unfair dismissal amongst other claims, points to the inevitable conclusion that the Claimant had made a claim of unfair dismissal arising out of the dismissal which took place before 26 April 2010. The Respondent in the ET3 that has now been produced to us says the dismissal took place on 26 March 2010.

20. Accordingly, in our judgment, the first two elements that a Claimant has to establish to bring himself within the Regulations are established on the documentation that has now belatedly but today been produced to us. However, as to the third element, namely that in consequence of presenting the complaint to the Employment Tribunal the dismissed employee is reinstated or re-employed by his employer, we have more concerns. That is a question of fact as to whether is the Claimant was reinstated or re-engaged because he had brought a claim of

unfair dismissal. Whilst we recognise in this case that evidence points strongly both chronologically and by reason of a settlement agreement dated 23 July 2010 to the reinstatement or re-engagement having been agreed to and undertaken because the complaint of unfair dismissal had been made, we do not have the necessary degree of confidence that the third element is inevitably shown on the material that we have before us to substitute our decision that the Regulations are satisfied. It is, in our judgment, perhaps unlikely but maybe possible that there were other reasons for reinstating or re-engaging the Claimant. Accordingly, we allow the appeal and remit the complaint to the Employment Tribunal for consideration of the third element required in the Regulations, namely whether it was in consequence of presenting a complaint of unfair dismissal to the Employment Tribunal that the Claimant was reinstated or re-engaged by the Respondent. This matter should be remitted to the same Employment Tribunal unless that is impracticable or in accordance with the general exceptions in orders that are made on such remission.