Appeal No. UKEATS/0030/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 13 November 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR ABDUL SATTAR — APPELLANT

(1) SPEYHILL LTD
(2) BECO SCOTLAND LTD (DEBARRED) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS SAAIMA KHALID (Solicitor) Ethnic Minorities Law Centre 41 St Vincent Place Glasgow G1 2ER
For the Respondent	No attendance or representation by or on behalf of the Respondents

SUMMARY

TUPE. The claimant claimed that his employment had been transferred from one employer to another, and that the TUPE regulations applied. The respondent argued that he was self employed. Held that the ET had not erred in law in deciding that the claimant was self employed and that the regulations did not apply. The weight to put on evidence, and the decision that evidence was credible, was a matter for the ET.

THE HONOURABLE LADY STACEY

Introduction

1. In this case, a person bearing to speak for the First Respondent sought an adjournment the day before the full hearing. He said that Kiren Kahlon, who had appeared as a director of the First Respondent at the Employment Tribunal, would not be able to attend, having missed a plane. He was asked to put the request in writing. A fax was received in which he said that she could not be available due to missing a flight. I refused the application. No-one appeared from the First Respondent nor on its behalf. The Second Respondent had not entered the proceedings.

2. The Claimant was represented by Ms Khalid in both the Employment Tribunal and before me. As stated above, the First Respondent had been represented by Ms Kahlon in the Employment Tribunal and, in the circumstances outlined, was not present or represented before me.

3. This is a case about unfair dismissal. It is a requirement of such a claim that the Claimant was employed by the Respondent, and in this case the First Respondent lodged a form ET3 in which it disputed employment. A Pre-Hearing Review was held, with evidence, to determine the question of employment status. By a Decision sealed on 21 February 2013 the Employment Judge, sitting alone, decided that the Employment Tribunal had no jurisdiction as the Claimant was self-employed. From that Decision the Claimant has appealed.

The Claimant's Case

4. Ms Khalid helpfully provided both a Skeleton Argument, which I was able to read in advance, and a written submission. She expanded on her Skeleton Argument and written

submissions orally before me. Her first point was that the Employment Judge had erred in law in his application of the **Transfer of Undertakings (Protection of Employment Regulations) 2006** ("**TUPE Regulations**"). What was said by the Employment Judge about those Regulations is found at page 34 of the Judgment in the following terms:

> **"Leaving aside the implications of the Transfer of Undertakings (Protection of Employment) Regulations 2006, to which I was not referred and whose relevance in this case was not entirely clear, the first respondents were quite clear that they took on the claimant on a different basis to that on which he had been employed by the second respondents."**

5. I therefore asked Ms Khalid if submissions were made before the Employment Tribunal about the Regulations, and she explained that the Regulations were referred to in the ET1 and in her written submissions before the Employment Judge and that, in those circumstances, she did not make oral submissions about them. Thus it seems that the Employment Judge is not entirely correct in saying that the Regulations were not referred to, as they were in fact referred to in the written submissions before him. Ms Khalid explained that the submissions that she had made were broadly those made by her in her written submissions before me, and these can best be categorised as follows.

6. She argued that there was no break in the Claimant's employment and that he continued to carry out the same duties after the First Respondent apparently took on the business of the Second Respondent. The Claimant understood that the Second Respondent had become bankrupt in or around January 2012 and had immediately been taken over and renamed Speyhill Ltd (that is, the First Respondent). The Claimant's position therefore was that he had continuous employment by virtue of Regulation 4(1) of the **TUPE Regulations**. He had submitted various forms, P60 and wage slips, and Ms Khalid was required to acknowledge, of course, that none of those dated after the January 2012 time when the First Respondent apparently came into the situation.

7. She further submitted that the Tribunal had accepted, at paragraph 31 of the Judgment, that the Claimant was employed with Beco Scotland until it ceased business. She had submitted at the Pre-Hearing Review that his duties had not changed when he started to work with Speyhill Ltd and therefore there had been no break in his employment. His position was that the First Respondent was responsible for telling him what to do on a daily basis. The Respondent was in control of his work and set hours during which he was required to attend. He was told that he would be responsible for opening and closing the premises, which were a cash and carry, on the days when he was at work. She had submitted that he was under the control of the Respondent because he could not change his days of work or his hours of work without approval. While he had to provide his own skills to the job, he did not have freedom to decide how to do it, as he was told by the Respondent what was required. He had very limited power of delegation, she submitted, in that he could ask someone else to carry out certain tasks, but he was not able to carry out any great delegation to a third party. He was paid in cash on a weekly basis and he did not register as self-employed with HMRC. Ms Khalid noted that the job that the claimant had been asked to carry out, according to the Respondent's evidence, was that of handyman on a self-employed basis. On his behalf she argued, however, that that was not so as he had continued to do the same job that he had done before. She had therefore submitted that the Claimant could meet the test set out in the cases of **Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance** [1967] 2 QB 497 and **Autoclenz Ltd v Belcher and Ors** [2009] EWCA Civ 1046. She argued that the matters that she had put before the Employment Judge, as I have outlined above, were such as to require him to consider whether or not the Regulations applied, and she argued that he had erred in law by not doing so.

The Employment Tribunal Decision

8. It seems to me that the difficulty for Ms Khalid is that the question of whether the Claimant continued in employment with the First Respondent was an essential fact which had to be decided in order to determine if the **TUPE Regulations** applied. As Ms Khalid clearly appreciated, a new business entity could take over an existing business and renegotiate with the people who had previously worked there. From the Judgment of the Employment Tribunal it is clear that Ms Kahlon said in evidence that had happened. And, while the Claimant did not give evidence which accorded with that, it was for the Employment Tribunal to decide what evidence accepted and what it rejected. The Employment Judge did so, and found at paragraph 15 of his Judgment, that:

> **"...when Ms Kahlon took on the running of the shop, she was aware that the claimant was employed by the second respondents. She asked him to stay on as a handyman. She offered him the position on a self-employed basis."**

9. As the Employment Judge found that as a fact, it is apparent, and it is explained later, that he accepted that evidence from Ms Kahlon. He went on, under paragraph 16, to say the following:

> **"Under the first respondents, the claimant worked a maximum of 30 hours per week, and did not work every week. Miss Kahlon advised the claimant at the outset that he would be self-employed, and that he would be responsible for the payment of his own tax and national insurance. He would receive no payslips but would be paid according to the number of hours he worked. The claimant was paid £7 per hour for each hour he worked. His weekly payments varied depending on the number of hours he worked, and sometimes he would be paid less than £210."**

In paragraph 17 the Employment Judge found the following:

> **"If the claimant did not attend for work, no disciplinary action would be taken against him, and he could take time off, for holidays or any other purpose, when he chose to do so."**

And in paragraph 18 the Employment Judge found:

> **"No contractual documentation exists to clarify the nature of the relationship between the claimant and the first or second respondents."**

10. Those paragraphs which I have just quoted came under the heading "Findings in Fact". At paragraph 36 of his Judgment, the Employment Tribunal Judge stated that he preferred the evidence of Ms Kahlon to that of the Claimant, although he was careful to make clear that he did not find that the Claimant was lying. Rather, he found that the Claimant had confused the arrangements previously in effect with the Second Respondents with the relevant arrangements with the First Respondents.

11. At paragraph 38 of his Judgment, the Employment Judge stated as follows:

> **"In my judgment, it is appropriate to conclude that the claimant was not an employee when he worked with the first respondents. They exercised no control over him in his work; they did not insist on his personal service; there was no mutuality of obligation between the claimant and the first respondents; the relationship was not intended by the first respondents to be an employment relationship; and, taking all the factors into account, this did not amount to a contract of service, but rather a contract for services."**

12. Thus it can be seen that the Employment Judge did have in mind the various points that were made to him about the evidence, and while it cannot be said that his Judgment is particularly lengthy or that it sets out perhaps as clearly as one might hope for his views about the Regulations, that is because he required to consider whether or not there was an employment relationship.

13. Miss Khalid's second point was related to the first, in that she argued that the Employment Judge had acted perversely when finding that Ms Kahlon was credible. That was important, because it was that finding of credibility on Ms Kahlon that enabled the Employment Judge to find that the **TUPE Regulations** did not apply. Therefore Ms Khalid argued that there were various reasons why the Employment Judge had acted perversely in accepting Ms Kahlon's evidence. . She stated that there were inconsistencies in her evidence, as she had said that she was a sole trader but had also said that she was a director of a company and that

there was Companies House documentation suggesting that there was indeed a limited company. Ms Kahlon had said that Mr Bashir, who was a person who had been involved with the Second Respondents, was not involved with her business, but then she had said that he did help her. Further, Mr Bashir was the person who had terminated the relationship with the Claimant. Ms Khalid went on to argue that the weight of documentary evidence was with the Claimant, as there was no P45 produced, and she argued that if the Claimant had had his Terms and Conditions renegotiated when a new business entity took on the business, then he would have been dismissed from the Second Respondents and would have started some new relationship with the First Respondents and in those circumstances there should have been a P45. She noted that none was produced. She also argued that there were payslips and forms P60 lodged on behalf of the Claimant, but she accepted that none of them related to the period after January 2012, when the First Respondents apparently took over. Further, she argued that the evidence from Ms Kahlon that the arrangement of a person such as the Claimant being self-employed was common in the trade, was not evidence that was worth very much because no-one else spoke to it. Ms Khalid did accept, after discussion, that the Employment Judge was entitled to consider that evidence, because there was evidence given by Ms Kahlon, who claimed to be in the trade, that that was common in the trade. Therefore Ms Khalid did accept that the Employment Judge was entitled, and indeed bound, to consider it but argued that he should put very little weight on it because no-one else spoke to it.

Conclusion

14. Having considered the various inconsistencies and criticisms which Ms Khalid was able to make of the evidence, I have come to the view that they are not sufficient to reach the high test of perversity. I accept that there are certain inconsistencies and I shall deal with them.

15. The first matter, that of Ms Kahlon saying that she was a sole trader and also a director, is not in my opinion an inconsistency which has very much in it. It is commonplace in employment law to find small businesses which have people who say that they are all sorts of things, such as the managing director, the owner, the sole trader or the director. Therefore that does not seem to be an inconsistency on which great weight should have been put by the Employment Judge. Similarly, the involvement of Mr Bashir is such that is perhaps not uncommon to have a person who is not employed but who assists. And as for the documentary evidence, it seems to me that, while Ms Khalid makes a point about the P45, it is not such an important point as to show that the Employment Judge was irrational in failing to accept it. It is balanced to some extent by the lack of any payslips or P60 after January 2012. As for the evidence that the arrangement was commonplace within the trade, as Miss Khalid accepted, that was really a matter for the Employment Judge to put on such weight as he thought fit.

16. I have therefore decided that this appeal fails. The Claimant has to show that the Employment Judge erred in law before any appeal can succeed. It is not, therefore, for me to consider whether the evidence is credible, and my earlier remarks about the inconsistencies should really be stated properly to be that the inconsistencies are not such as to show that the Employment Judge acted irrationally in not regarding them as of importance, because that after all is the question before me. I have to consider if the Employment Judge considered properly all that was put before him, and if he arrived at a decision which was open to him. It is of no relevance as to whether I would have made any different decision.

17. I have decided that while the Judgment is short, and while it could have given more explanation of the Employment Judge's reasoning, it does cover the essentials. I do not accept that he has failed to consider the **TUPE Regulations,** as he does set out his thinking about the

employment relationship, which was a necessary step in considering those Regulations. As for the argument about perversity, as Miss Khalid clearly understands, she has to meet a high test. She correctly referred me to the leading authority of **Yeboah v Crofton** [2002] IRLR 634, at paragraph 94. While the case is well known, it probably is useful to note exactly what is said in it. It one of the frequently referred to cases in this jurisdiction, and is therefore available to me on the bench. Paragraph 93 is in the following terms:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal, it must proceed with 'great care',** *British Telecommunications PLC –v- Sheridan* [1990] IRLR 27 **at para 34.**

18. In this case I accept that Ms Khalid has submitted that the Employment Judge acted perversely in finding Miss Kahlon credible, and she has given reasons for her assertion, but I have found that Ms Khalid's reasons are reasons which go to weight. These reasons were properly submitted by her at first instance, and some may have thought would have been fairly compelling reasons at first instance. However, they did not succeed at first instance, and the Employment Judge carried out his task of listening to what was submitted, considering it all fully, and making a decision. He has given his decision, and it is not, in my opinion, clear that the Employment Judge was plainly wrong. Therefore the high test of perversity is not met, and that is why this appeal must fail.

19. I should say that I am grateful to Ms Khalid for her clear, concise submissions and the help that she has given me.