Appeal No. UKEAT/0067/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 October 2013

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MR A J BYRNES — APPELLANT

(1) BLUESKY FINANCIAL CLAIMS
(2) BLUE SKY CLAIMS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR A J BYRNES (The Appellant in Person)
For the Respondents	MR R HARGREAVES (Representative)

SUMMARY

PRACTICE AND PROCEDURE – Review

JURISDICTIONAL POINTS – Claim in time and effective date of termination

The issue on the appeal was whether the Employment Tribunal had erred in law by refusing to review a decision that the claim in respect of unlawful deductions was out of time. In effect the Appellant had complained about the course of events at the hearing and about the decision that he was out of time and that should have been sufficient to trigger a reconsideration even though the rest of the letter applying for a review concentrated on reasons why the application had not been made earlier. The fact that the decision as to the claim being out of time appeared to be contrary to the decision of this Tribunal in **Arora v Rockwell Automation Ltd** UKEAT/0097/06 and thus very arguably wrong (subject to the facts, which remained to be properly investigated), whilst not drawn to the attention of the Employment Judge at that stage and not decisive by itself, nevertheless weighed in the balance when deciding whether there had been an error of law.

HIS HONOUR JUDGE HAND QC

1. This is an appeal that relates to a review judgment made by Employment Judge Dawson sitting at Liverpool on 7 November 2011, the written judgment having been sent to the parties on 28 November 2011. I use the word "relates" advisedly. The case has a relatively complicated history into which it is necessary for me to go. The application for a review related to the dismissal of the Claimant's claim in respect of working time, breach of contract and wrongful deduction from wages. He submitted his claim on 15 April 2011. His case was due to have been heard on 17 August 2011. He, however, did not get notice of that fact, and in his absence Employment Judge Dawson, sitting at Liverpool on that day, dismissed his claim. He sought a review of that, and the matter came before Employment Judge Dawson again at Liverpool on 7 November 2011. Having heard the Claimant's account of why he had not attended on 17 August 2011, Employment Judge Dawson decided to review and in effect rehear the claim. Paragraph 3 of his judgment reads as follows:

> **"During the course of the hearing, however, I noted that Mr Byrnes had stated that his employment terminated on 28 November 2010. He brings claims for unauthorised deduction of wages under the Employment Act 1996 under the Working Time Regulations 1998 and for breach of contract. In respect of all those claims the claim must be presented within 3 months of the time when the sums payable to the claimant were due unless it was not reasonably practicable to present the claim in time. The claim in this case was not presented until 15 April 2011."**

2. It is entirely accurate, in a precise sense, for Employment Judge Dawson to have said that that issue arises or arose during the course of the hearing. I accept, however, Mr Byrnes' description of it that in fact Employment Judge Dawson was in the course of a judgment in favour of the Claimant when he noticed that the ET1 form had been lodged with the Tribunal on 15 April 2011. In the rest of the review judgment of November 2011, which is a short judgment, Employment Judge Dawson considered whether it had been reasonably practicable

for the Claimant to submit his claim within three months of 28 November 2010; he concluded that it had been, and accordingly he dismissed the claim on the basis, although he does not say so, that since the claim had not been lodged in time the Employment Tribunal had no jurisdiction to hear it.

3. The Claimant, who has represented himself today, applied for a review of that decision. His letter of review, which is at page 44 of the Respondent's bundle – this being a somewhat unusual case in this sense also, that the parties have been unable to agree a bundle and each party has submitted a bundle – is the letter applying for a review. It is dated 12 December 2011, and it starts as follows:

> **"Dear/Judge Dawson**
>
> **I would like you to review the decision you made on November [sic] because I have some fresh evidence and comments to make concerning the above case. Although you stated that you sided with my account of the case and evidence supplied you dismissed it because I was late with the application for it."**

4. He then goes on to deal with the explanation he had given and why it was true. I shall need to come back to those first two sentences of that letter in due course.

5. There is a dispute as to the time when payments of salary and other remuneration should have been made. Mr Hargreaves, a director of the Respondent to this appeal, has appeared before me. He disputes that the salary was paid a month in arrears. That is a factual matter that has never been investigated. The Claimant wrote to this Tribunal in January of 2012; I do not know if the letter is dated, although it has a dated fax header line. One iteration of this letter appears at page 45 of the Respondent's bundle and another appears in the Claimant's bundle (unhappily, the pages have numbers on them at both the top and the bottom that do not always agree and in the version of that bundle I have are sometimes cut off; it is immediately before a

page that seems to be labelled page 30, and it may well be that it is page 29 of that bundle). That version appears to be dated 9 January 2012, although the last part of it is cut off at the side of the page. It seems likely from the chronology that it was dated 9 January 2012; that, indeed, is the date in the fax header line at page 45 of the Respondent's bundle, although it does not appear at page 29, if page 29 it is, of the Claimant's bundle. The letter reads as follows:

> **"A J Byrnes v Bluesky**
>
> **I have asked Judge Dawson to review his decision on this case in November, since I have not had a reply as yet. I would like to appeal against his decision to ensure that the appeal is in time. I have already told one of your staff on the phone that I would like to appeal you now have it in writing."**

6. Less than a month after that, on 6 February 2012, the Employment Tribunal wrote to the Claimant. The body of the letter reads:

> **"Employment Judge Dawson, to whom I have referred this case, directs me to write as follows. The application for a review is refused because (a) the matters raised in the letter of 12 December 2011 could have been raised at the hearing on the last occasion; (b) the matters set out in that letter would not give rise to grounds for findings that it was reasonably practicable for the claim to be presented within three months."**

7. The next event is that at the end of February 2011 the Claimant was paid the sum of £1,908 by the Respondent. This corresponded to a month's wages including bonus, but the Claimant alleges that it was short of what he was owed in terms of bonus, holiday pay and notice pay. In fact, in June 2011 he did receive one week's notice pay and five days' holiday pay. That was, on his case, still an underpayment; there should have been two weeks' notice, not one, and he claims to still be owed four days' holiday pay, and the payment of overtime and bonus has remained a constant complaint, at least since the termination and possibly before.

8. None of that factual matrix was investigated by Employment Judge Dawson, and I reiterate it because at least part of it was considered by Mitting J when he examined this case. I

shall come to his judgment shortly. I endeavoured to explain to the parties at the outset of the appeal that this hearing could not result in a final award of the underpayment alleged by the Claimant pursuant to the **Employment Rights Act 1996** (ERA), that this Tribunal deals only in questions of law and that the actual ascertaining of facts relevant to alleged deductions, relevant to whether or not there were alleged deductions and the amount of alleged deductions, were matters to be decided by the Employment Tribunal. Not surprisingly, this was something of a disappointment to the Claimant, who believed that his case would be finally resolved today. I am sorry to have been the bearer of bad tidings in that respect, but I have endeavoured to explain what the functions of this Tribunal are and what are the limitations imposed by statute on the powers that I have for the disposal of cases.

9. There is a factual dispute as to whether or not there were negotiations taking place between the Claimant and Mr Hargreaves of the Respondent in this period from December onwards. I am conscious of the fact that these have never been properly resolved. The Claimant, Mr Byrnes, said to me that these matters had been ventilated before Employment Judge Dawson and Employment Judge Dawson had found the facts to be in his favour. I do not know whether that is correct or not; as I have indicated, at paragraph 3 of the judgment Employment Judge Dawson says that the limitation point arose "during the course of the hearing"; I have already explained that it is asserted by the Claimant that the case was practically over when the limitation point arose. This is a matter that will need to be ventilated in the event that the case goes back for a further review.

10. That leads me to the second part of the explanation that I gave to the Claimant as to how this case was likely to be disposed of. Whatever is the scope of this appeal, something to which I shall come in a moment, it seems to me inevitable that the matter will have to go back to be

looked at again by an Employment Tribunal and probably by Employment Judge Dawson, although I have heard no submissions about that and have made no final decision about it. Whatever had been happening in the period after November 2011 when Employment Judge Dawson's judgment was promulgated and sent to the parties, on 10 March 2012 a Notice of Appeal was lodged at this Tribunal. The Notice of Appeal that was lodged is at page 4 and 5 of the Claimant's bundle. At paragraph 3 the appeal is said to be against the Employment Tribunal decision held at 28 November 2011 at Liverpool, and it gives the parties' names; and in fact at paragraph 4 the names are, in effect, repeated so neither paragraph is of much help in identifying the scope of the appeal. But the Claimant had appended to that Notice of Appeal not only the judgment on review sent to the parties on 28 November 2011 but also the letter from the Tribunal of 6 February refusing the application for a further review; that is to say, a review of the review, if you like.

11. On 13 April 2012 this Tribunal wrote to the Claimant noting that two decisions had been appended to the Notice of Appeal and asking whether it was his intention to appeal against one, the other or both decisions; if his intention was to appeal against both, then what this Tribunal proposed to do was, as it is put in the letter, "split" the appeals and give different numbers to the different appeals. I have looked through the file; that is precisely what has happened. The Notice of Appeal has been given two different potential appeal numbers and has been split into an appeal against the review decision sent to the parties on 28 November 2011 and an appeal against the refusal to review that review decision, that refusal being dated 6 February 2012. Appeals to this Tribunal must be lodged within 42 days of the decision appealed from. The appeal from the decision of 28 November 2011 being lodged on 12 March 2012 was more than 42 days after the date the decision was promulgated; accordingly, it was out of time. This was pointed out to the Claimant, and an application was made to extend time. The Registrar

considered the matter on 2 August 2012. She took the view that there were no grounds to extend time. She does not in her judgment refer to the fact that the Claimant had written as early as January 2012 indicating that he intended to appeal. Of course, writing a letter, indicating an intention to appeal is not lodging a proper Notice of Appeal. Nevertheless, it is perhaps a matter that might have some bearing on the extension of time application; in the event it does not appear to have been considered or, if it was, then it cannot have been thought of as having sufficient weight to justify an extension.

12. So, that appeal, being out of time and the refusal to extend time decision having been made by the Registrar, has ceased to have any viability. The only extant appeal was therefore the renumbered Notice of Appeal, which was treated as an appeal against the refusal by Employment Judge Dawson to entertain a further review in respect of his review decision of 28 November 2011. It is that matter that came before a Judge of this Tribunal on 2 July 2012 under the paper sift procedure. He took the view that the appeal against the refusal of the application for a further review raised no arguable point of law. He did not know the circumstances in which that issue had arisen at the hearing before Employment Judge Dawson on 7 November 2011; he cannot have known that, because he would only have had the material relating to the November judgment and it may have meant nothing to him that the first two lines of the letter applying for a review contained the statement that Employment Judge Dawson had sided with the Claimant's account.

13. As he was entitled to do, the Claimant sought an oral hearing for a reconsideration pursuant to rule 3(10) of the Employment Appeal Tribunal Rules. The matter came before Mitting J for that oral hearing on 13 February 2013. Mitting J considered the factual background and heard from the Claimant some of the basic facts that I have just outlined.

Perhaps some of the detail was not before him, but quite plainly he appreciated, as he says in the short two-page judgment that appears at pages 50 and 51 of the Claimant's bundle, that the date of dismissal was 28 November 2010, at that stage money in lieu of notice, holiday pay and bonus were at issue, that the Appellant was paid some of his wages in early February 2011, together with a portion of the bonus, and that eventually he was paid some part of his notice pay and some part of his holiday pay in June 2011. After reciting some of the factual material, the learned Judge at paragraph 6 of his judgment refers to sections 13 and 23 of the **ERA 1996**, saying that Employment Judge Dawson had failed to direct himself expressly as to those sections. He also set out section 23. He came to the conclusion in paragraph 8 that on those facts under section 23(2)(a) the Claimant's complaint had been presented in time and that he had an unanswerable appeal against a decision of the Employment Tribunal to refuse to entertain his "appeal" (I think that must mean his claim – it was not at that stage an appeal – and the use of the word "appeal" must be a slight grammatical or syntactical error) on the ground that it was out of time. Accordingly, he directed that the matter should go through to a full hearing but a transcript of the Reasons should be given so that the employer could consider whether or not it should consent to the appeal and to the remission of the case to the Employment Tribunal to decide it on its merits.

14. This has caused some slight confusion to the Claimant. He took the view that he had succeeded and that the matter would go back, if the Respondents would consent to that course. But what has happened is there has been an objection, so that is why the matter has come back to this Tribunal. This is the third aspect of the case that I have been at pains to try to clarify so far as the Claimant is concerned. I have endeavoured to explain to him that the matter had not been resolved by the judgment made on the oral hearing pursuant to rule 3(10) by Mitting J and that unless the parties came to some kind of arrangement what Mitting J had decided was that

the appeal disclosed a sufficiently arguable case for it to proceed to a full hearing and it is that hearing which is taking place today.

15. As it seems to me, there are two issues now raised in this appeal. The first and most important one is as to the scope of this appeal; the second is as to whether Mitting J's analysis that this appeal was unanswerable is correct. The second only becomes relevant if that analysis is within the scope of this appeal as presently constituted.

16. I have taken some time to consider the matter. As I indicated earlier, it was not without difficulty that the history of the case was clarified as a result of access to the appeal file at this Tribunal. I am not clear as to the extent to which that clarification would have been available to Mitting J. My own difficulty at the outset was that from the bundle that was presented to me it was not clear to me how this matter had developed or indeed what was exactly before me. At first sight I thought that the appeal itself was out of time, but of course in the light of the history that I have explained the appeal had become two appeals, and it is only one that is out of time. I have had the opportunity to look at the bundle that was before Mitting J in February 2013. He must have had a similar difficulty to the one that I have had, but of course, it not being a full appeal, he would not necessarily have had the opportunity to look into the matter in the way that I have done.

17. He has proceeded, as his judgment discloses, on the basis that what is at issue is what was decided on 7 November 2011. Another way of looking at his decision, although this is not articulated in the judgment, might be that he appreciated that what he was considering was the refusal to review the decision of 28 November 2011, and he took the view that if what had been decided on 28 November 2011 was plainly wrong, then, irrespective of what was before the

Employment Judge on the application for a review, the Employment Judge should have taken the opportunity to consider it. The third way that he might have looked at it is that in the letter of application for a review there was sufficient material for the Employment Judge to have appreciated that what was being challenged was the decision that the judgment was out of time. He does not say that, and I am not confident that the review letter was before him. It does not appear to me from looking at the file that it was in the bundle that was put before him.

18. Accordingly, it seems to me unlikely there was a third way in which he could have considered the matter. If Mitting J took the view that this appeal, which relates to the refusal to review, could succeed because Employment Judge Dawson was wrong in law in paragraph 3 of his judgment on 28 November, with great hesitation I would differ from him. I do not think that on a consideration of whether an Employment Judge has erred in law by refusing an application for a review the fact that the subject of the prospective review plainly contains an error of law is of itself a ground for review unless it is in some way articulated.

19. Thus, as it seems to me, the issue in relation to this appeal, the scope of this appeal and the relationship of the scope of this appeal to Mitting J's legal analysis is whether there is in the Claimant's application for a review anything that should have caused Employment Judge Dawson to think that he ought to look again at his decision. In my judgment there is and it lies in the second sentence. The first sentence, it will be remembered, referred to fresh evidence and to comments concerning the decision and much of what follows does not bear on the issue of the correctness of Employment Judge Dawson's self-direction. The second sentence, in my judgment, does indicate a dissatisfaction with the way in which the matter was resolved and the substance of what had been resolved. I reiterate:

"Although you stated that you sided with my account of the case and evidence supplied you dismissed it because I was late with the application for it."

20. Whilst not fully articulating a complaint both about the way in which that decision had been arrived at and about the correctness of the decision itself, it seems to me sufficient to have triggered the Employment Judge to reconsider what had been decided. It involves in one sense a natural justice point that the Claimant had been in the middle of a judgment or at least in the middle of a case in which all appeared to be going well when suddenly the prize was snatched away from him by a challenge to the correctness of the decision. It is true that the rest of this letter deals with the reasons why the application was put in at the time that it was, but it seems to me that those two matters, albeit somewhat slight, should have triggered a reconsideration. Thus I have reached the conclusion that the issue as to whether the judgment arrived at by Employment Judge Dawson as to the claim being out of time was sufficiently challenged by the letter to have made it necessary in the interests of justice to reconsider the matter.

21. I have already indicated that I have some hesitation in accepting the alternative analysis that simply because something has plainly gone wrong that of itself should trigger a review. On the other hand, the fact that there does appear to be a substantial argument about whether a matter has gone wrong is, in my judgment, to be added to any consideration of whether something has been raised. It cannot of itself without more and without being raised amount to an error of law on the part of the Employment Judge if he refuses a review, but if there is material that puts that decision in issue, then it seems to me that the merits of that decision must weigh in the balance and be given some substantial weight.

22. I turn then, having decided that this issue is within the scope of the current appeal, to the merits of the issue itself. Section 13(3) of the **ERA 1996** reads:

> **"Where the total amount of wages paid on any occasion by the employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

23. The relevant time limit provision is that in section 23(2) of the Act, which reads:

> **"Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—**
>
> **(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made […]."**

24. Mitting J does not refer to the third subsection of section 23, but it might be thought that it has some relevance, and so I shall set it out. It reads:

> **"Where a complaint is brought under this section in respect of—**
>
> **(a) a series of deductions […]**
>
> **the references in subsection (2) to the deduction […] are to the last deduction […] in the series […]."**

25. Armed with his self-referral to the statute (not, I repeat, section 23(3)), Mitting J reached the conclusion at paragraph 8 of the judgment, which I have already quoted. He did not refer, although I understand it to have been cited to him, to a decision by a division of this Tribunal comprising HHJ Altman in the case of **Arora v Rockwell Automation Ltd** UKEAT/0097/06. In that case there was a controversy about the amount of an overtime payment. If time started to run from the date of termination, then the complaint was out of time. If, however, it did not start to run until the date the wages became payable, then the application to the Employment Tribunal must have been made in time. In the course of a careful and considered decision HHJ Altman identified three types of unauthorised deduction: firstly, a deduction expressly so called, which he regarded as "a simple deduction"; secondly, a payment falling short of what was due; and thirdly, a complete non-payment. In the case of what he called a simple deduction

– that is to say, where a payment falls short of what is due – he regarded section 23(2) as stipulating the relevant time limit, the relevant time limit being the date of payment of the wages from which the deduction was made. That is not, as he pointed out, a reference to the due date of payment (that is to say, the date when the payment should have been made) but is a reference to the actual date of payment (that is to say, when the payment actually was made). In the earlier case of **Group 4 Nightspeed Ltd v Gilbert** [1997] IRLR 398 HHJ Colin Smith QC, presiding over a division of this Tribunal, had concluded that:

> **"It is only when an employer fails to pay a sum due by way of remuneration at the appropriate time (i.e. at the contractual time for the payment) that a claim for an unlawful deduction can arise."**

26. HHJ Altman at paragraph 11 of the Judgment in **Arora** said this:

> **"I consider that it would be wrong to apply that construction to the current situation and to say that time begins to run when the contractual obligation arises. The reason for that is that in the *Group 4* case the Tribunal were concerned with identifying the moment in time when the deduction became unlawful and held that it was not unlawful until the contractual date had passed, but that does not, it seems to us, detract from the wording of the statute, which in circumstances where there has been an actual deduction, or shortfall, makes it clear that it is only when the payment has been made to which the deduction has applied, that time starts to run."**

27. He went on in the rest of the judgment to consider the third situation, and he took the view that a different position might apply. I am not concerned with that, although I am not entirely convinced that there ought to be any separation between categories where Parliament has provided only one definition of a limitation period and only one definition of deduction (that is to say, section 23(2) and section 13(3)) but is not relevant so far as this appeal is concerned.

28. This case clearly relates to the kind of deduction characterised by HHJ Altman as a simple deduction. In any event, in the **Arora** decision it was never canvassed that the relevant

date from which time starts to run was the date of termination of the employment. That can be the relevant date only if it is the date when the payment is made (again, section 23(2)), otherwise that date is not part of the statutory definition of limitation. Accordingly, it does seem to me on that issue the analysis of Employment Judge Dawson was incorrect as a matter of law.

29. No doubt there is much else to be argued about in this case. I say that with a very considerable misgiving. I note with some sympathy the position of both parties before me has been that the matter has been dragging on for a very long time and that both of them one way or the other would like to see an end to it. But, as I identified earlier in this judgment, although some facts can be stated for the purpose of considering whether there has been an error of law made by Employment Judge Dawson, it is a matter for the Employment Tribunal to decide what the facts actually are. Therefore, it does seem to me, having concluded that the refusal to review was within the scope of this appeal, that the only way in which I can dispose of the appeal, given that I have concluded it was an error of law on the part of Employment Judge Dawson to refuse to consider a review of the review decision in the circumstances of this case, which, whilst not necessarily unique, are unusual, that the matter should go back to him to consider whether he would be prepared in all the circumstances of the case to review the case on the basis that the issue of whether he was right was raised, albeit obliquely, by the letter and that there is a strong argument that he approached the issue in the decision of 28 November on the wrong basis.

30. Accordingly, I propose to allow the appeal and remit this case to an Employment Tribunal. Subject to anything the parties may wish to say I shall remit this for reconsideration

by Employment Judge Dawson of his refusal of the application for a review of the decision of 28 November.

[The parties did not wish to make any further submissions as to disposal]