Appeal Nos. UKEAT/0577/12/RN
UKEAT/0431/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 October 2013

Before

MR RECORDER LUBA QC

(SITTING ALONE)

MR M S BONKAY-KAMARA — APPELLANT

APCOA PARKING UK LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ALEX USTYCH (of Counsel) (Appearing through the Free Representation Unit)
For the Respondent	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

UNFAIR DISMISSAL

Tribunal procedure. Whether, having given directions for a full hearing, and dismissed a subsequent application for a pre-hearing review, the Tribunal could then later direct a pre-hearing review.

Held: the Tribunal had no power, in the absence of changed circumstances, to make an order for a particular form of hearing when it had previously rejected an application for that form of hearing. **Goldman Sachs Services Ltd v Montali** [2002] ICR 1251 followed and applied.

MR RECORDER LUBA QC

The first appeal

1. This is my Judgment on the first of two appeals that I have heard today concerning the same parties. In each case the Appellant is Mr Bonkay-Kamara, and the Respondent is Apcoa Parking UK Ltd. Mr Bonkay-Kamara is an employee of the Respondent company. Both appeals arise from proceedings initiated by Mr Bonkay-Kamara (hereafter, the Claimant) in a claim form that he lodged with the Employment Tribunals Service in March 2011. By that claim he sought payment of monies from the Respondent, which monies were described using the pre-printed text of the claim form as, respectively, "arrears of pay" and "other payments".

2. The Particulars appended to the claim form asserted that the Claimant had been employed by the Respondent since 1998 as a parking attendant and from 2003 as an administrator. His claim was that from 2004 to 2008 he had, during the temporary absences of his contract manager Mr Perera, 'acted-up' to cover that post. Further, when the contract manager's employment had ended in 2008, the Claimant had 'acted-up' in that role until the end of December 2010.

3. Notwithstanding that action on his part, the Claimant claimed that he had been only paid at the rate due to him in his position as administrator. His claim was that he ought to have been paid the rate for the contract manager role during those periods when he had performed it. Accordingly, he sought to recover what he considered unpaid wages and to obtain a declaration that there had been an unlawful deduction of wages for the purposes of sections 13 and 27 of the **Employment Rights Act 1996**. I shall call this "the wages claim".

4. Additionally, two further claims were made in the claim form. They were what I may briefly describe as, firstly, a claim for breach of the rules as to maximum working time and secondly a claim for non-payment of expenses. I shall call them, respectively, the "working-time" and "expenses" claims.

5. The Respondent's answer to the claims was lodged with the Employment Tribunals Service in April 2011. It denied any liability and, in respect of the unpaid wages claim, it expressly denied that the Claimant had ever done more than provide temporary cover during his manager's absence for which services no additional payment was due.

6. The procedural history of the claims thereafter is important. As I have said, the claim was made in March 2011 and the answer to it received in April 2011. On 4 May 2011 the Respondent asked the Claimant for further details of the claim. On 13 May 2011 Employment Judge Grewal gave case management directions for the determination of the claim at a full hearing. The directions required, firstly, a statement from the Claimant, to be provided by 28 May 2011, and, secondly, compliance with directions for bundles of documents and the preparation of witness statements in anticipation of the full hearing.

7. By letter of 6 June 2011 the Respondent invited the Employment Tribunal to convene a Pre-Hearing Review. The terms of that letter and thus that application are not before me, but it was determined on the same day. The Employment Judge considering and rejecting that application gave reasons in the following terms:

> **"The application for a Pre-Hearing Review has been refused, as to grant it would not be in accordance with the overriding objective. A Pre-Hearing Review is likely to be of the same length and to cover the same issue as the substantive hearing."**

8. Undaunted, the Respondent's solicitors wrote again on receipt of that notification by a further letter dated 8 June 2011. The text of that letter was provided to me during the course of the hearing of the appeal. The applications made by the Respondent's solicitors in the letter of 8 June 2011 do not seek to disturb or upset the refusal of the Pre-Hearing Review. First, it invites the Employment Tribunal to make an order compelling compliance with the earlier case management order, which had required a statement by 28 May 2011. Second, it invites the Employment Tribunal, once the statement had been received and the Tribunal had considered its contents, to then in turn reconsider the earlier request for a Pre-Hearing Review. It was not suggested to me that any of the steps suggested to the Employment Tribunal to be taken were in fact taken. Rather, the next development was that on 16 June 2011 the Claimant generated replies to the request for Particulars of his original claim.

9. On 24 June 2011, the Employment Tribunal gave notice that there would indeed be a Pre-Hearing Review and that it would take place on 14 July 2011. By letter dated 4 July 2011 the Claimant's solicitors objected to the Tribunal taking that course. They pointed out in their letter that the Employment Tribunal had not been invited to review its earlier decision not to hold a Pre-Hearing Review. The letter makes the point that the Employment Tribunal in any event had no power to review its earlier decision and further asserted that given the factual and legal issues in play on the claim a Pre-Hearing Review was inappropriate. The Employment Tribunals Service replied in these terms:

> **"Your file was referred to an Employment Judge, who states as follows: the Pre-Hearing Review will go ahead as listed."**

10. And so it did. The hearing took place on 14 July 2011 before Employment Judge Goodman. The parties were represented by their respective solicitors. The Employment Judge considered all three aspects of the Claimant's claim; that is to say, the wages claim, the working-time claim and the expenses claim. Her written Reasons open with the following paragraph:

> **"Today's hearing is a Pre-hearing Review to determine whether all or any of the three claims presented to the Tribunal by the Claimant should be struck out as disclosing no reasonable prospect of success or be the subject of a Deposit Order under Rule 20 because they disclosed little reasonable prospect of success."**

11. The Reasons given by Employment Judge Goodman then deal with each of the three dimensions of the Claimant's claim. Dealing with the wages claim, paragraphs 9-11 of her Reasons set out the nature and details of that claim as they appear from the claim form and from the Further Particulars of the claim form that had been given in the answers to the questions posed by the Respondent.

12. On the issue of whether there was any obligation on the part of the Respondent to pay the Claimant at the rates of a contract manager whilst he was temporarily undertaking those duties, the Employment Judge said this at paragraph 13 of her written Reasons:

> **"The issue for the Tribunal is whether the basis of the legal entitlement for the claim that the Claimant is entitled to the rate for the Contract Manager's job when performing his duties. It is not asserted by either side that this is an express part of the contract whether written or verbal that the Claimant should be paid the rate for the Contract Manager's job. The Claimant has said orally that it was implied by custom and practice and in reply to the questions asserts that it was the practice to pay people for acting up, and his expectation appears to be based on other staff being paid to act up."**

13. As to the answer to the issue described in paragraph 13, the Judge was taken by both parties to the leading authority of **New Century Cleaning Company Ltd v Church** [2000] IRLR 27 CA. That case describes the circumstances in which entitlement to wages might be

made out in cases other than those of an express agreement to pay. At paragraphs 15-16 of her written Reasons the Judge sets out her reasoning and conclusions in ultimately holding that there was no real prospect, or rather no reasonable prospect, of the wages claim succeeding if permitted to go forward for a full hearing by the Employment Tribunal.

14. In respect of the other two claims, the Employment Judge decided that the claim for unpaid expenses should proceed to a full hearing, but she struck out the claim for compensation in relation to excess working time, for reasons that she gave at paragraphs 19-24 of her written Reasons.

15. From the strike-out of two of his claims – that is to say, the wages claim and the working-time claim – Mr Bonkay-Kamara appeals to this Employment Appeal Tribunal. He takes two points: firstly, that the Pre-Hearing Review ought not to have been convened or proceeded with at all because it was embarked upon without jurisdiction; secondly, and in relation to the wages claim, he contends that the Employment Judge erred in law in striking out a claim of that nature, because it was one that could only properly be determined by resolution of factual disputes by the hearing of evidence given on both sides.

16. The Claimant is no longer acting through his former solicitors. He has had in their place the considerable assistance before me of Mr Alex Ustych, instructed by the Free Representation Unit. For its part, the Respondent is no longer represented by its former solicitors; instead, it has had of late the assistance of Mr Richard Rees. I am grateful to both Mr Ustych and Mr Rees for the high quality of the skeleton arguments they have prepared for this hearing and for the succinct way in which they have presented their submissions on this appeal.

17. I take first the jurisdiction point. Mr Ustych submits that this is a case in which the Employment Tribunal had given directions for a full hearing. Moreover, it had expressly rejected an application for a Pre-Hearing Review. What had then happened had presented the parties, especially the Claimant, with an unexplained about-face. A Pre-Hearing Review had been convened without explanation. When the Claimant's solicitors had disputed the convening of it, no reasons were given for deciding to proceed with it. What Mr Ustych contends is that the Tribunal proceeded without jurisdiction to organise and undertake this Pre-Hearing Review. He took my attention to the decision of this Employment Appeal Tribunal given in **Goldman Sachs Services Ltd v Montali** [2002] ICR 1251. That was a decision of a division of this Tribunal over which HHJ Peter Clark presided. In that case this Appeal Tribunal decided that although it was open to an Employment Tribunal to make an order inconsistent with an earlier order of its own it should only do so in appropriate circumstances and most usually only when there had been a change of circumstances since the earlier order. Relying upon that authority and the circumstances of this case, Mr Ustych submitted that the ultimate hearing by way of Pre-Hearing Review was vitiated for want of jurisdiction. On this aspect of the case, Mr Rees reminds me that rule 10 of the then **Employment Tribunals (Constitution and Rules of Procedure) Regulations** gave exceptionally wide case management powers to an Employment Tribunal, whether acting on an application by one of the parties or of its own motion, to take such steps and make such directions as it considered fit. Mr Rees contends that that is ample power to cover what happened in that case; that is to say, a direction for a Pre-Hearing Review, even though a Pre-Hearing Review had previously been ruled out.

18. For my part, I accept Mr Ustych's submissions. It is trite law that the Employment Tribunal had no power to review, let alone reverse, its earlier decision to proceed to a full hearing and later to reject an application for a Pre-Hearing Review. Certainly, Regulation 10 is expressed in wide terms, but those terms reflect the earlier Rule, which was expressly addressed in the **Montali** case. The Judgment of the Employment Appeal Tribunal in that case indicates in terms that the wide scope of the Rule does not allow the Employment Tribunal to direct something occur that has previously been refused, absent some material change of circumstances. In the instant case no one took my attention to any relevant change of circumstances whether suggested, identified or otherwise. More directly, the decision to convene the Pre-Hearing Review cannot be attributed to any application made by the Respondent. Even if its letter of the 8 June 2011 can be treated as a conditional application for a Pre-Hearing Review, the precondition mentioned in it had not in fact occurred. No further order of the Employment Tribunal directed to securing compliance with an earlier case management order appears to have been promulgated, and nothing is before me to indicate that any response to such order was received. The necessary preconditions for this conditional application for a further Pre-Hearing Review were thus not carried out. So, if the Tribunal was acting within its jurisdiction pursuant to rule 10, the determination of an Employment Judge to hold a further Pre-Hearing Review must have been based on his or her own initiative, but if that was the case, there was a failure to comply with the requirements of rule 12, which dictate what must happen if the Tribunal acts of its own motion.

19. In short, I am satisfied that there ought never to have been a Pre-Hearing Review on 14 July 2011, that it proceeded without jurisdiction and that accordingly the orders made at the Pre-Hearing Review must be set aside.

20. That of itself would be sufficient to dispose of the appeal, but it is right that I address the second ground of appeal developed by Mr Ustych, namely that it was inappropriate for the Employment Judge in the instant case to dispose of the claim at strike-out, because it was a fact-sensitive claim only capable of proper determination on hearing the evidence at a full hearing. Mr Rees submitted that the Employment Judge had properly directed herself, applied the familiar authorities and had been entitled to reach a decision that the claim had no reasonable prospect of success.

21. For my part, I am satisfied that on this aspect of the appeal also the Appellant succeeds. This was indeed a fact-sensitive claim. The claim form was not well drafted, despite the fact that Mr Bonkay-Kamara had at the time access to solicitors and they settled the claim form. But there was, in my judgment, sufficient material in the claim form and in the answers to the Respondent's questions to raise real issues as to whether the facts relied upon could make out a claim for payment that had reasonable prospects of success. It will be recalled that in the claim form the Claimant had asserted an expectation and understanding that he would be paid for what I shall broadly call the acting-up functions. Moreover, in his answers to the Respondent's questions, he had pointed to a particular example of another site operated by the same company at which it appeared that such payments were being made. Further, the answers referred to an instance of his raising the point about payment and being assured by his manager that this would be addressed expressly in a forthcoming contract. Those materials, to my mind, amply demonstrate that what was required was consideration of the evidence underpinning those assertions and the Respondent's answers to them. No Employment Judge properly directing herself on that material could, in my judgment, have determined that the proper course was to

strike out. The claim as it appeared to the Employment Judge may have been a relatively weak one, but that could have been addressed by exercise of her powers in relation to the making of a deposit. So, had the appeal turned on this second aspect, I would have accordingly allowed it on this ground.

22. The appeal also takes issue with the strike-out of the excess hours, or working-time claim. Ordinarily, that too would now be restored for full hearing, but by a cross-appeal the Respondent takes a point of law that has been identified by its representative, Mr Rees. He submits that insofar as the claim is based, as it appears to be, on Regulation 4 of the **Working Time Regulations** (WTR), it cannot be pursued before the Employment Tribunal by an individual. Enforcement is, he submits, to be undertaken by the Health & Safety Executive. On considered reflection, I understood Mr Ustych to concede that that submission was correct. It follows that although the claim for wages can be restored, a claim under the WTR cannot be.

23. The appeal is accordingly allowed in part only, and my order will show precisely which parts of the Claimant's claim must now go forward for full hearing at the Employment Tribunal.

The second appeal

24. I now proceed to consider the second of two appeals that I have heard today.

25. By his claim form lodged in March 2011 Mr Bonkay-Kamara ('the Claimant') asserted an entitlement to be reimbursed for certain expenses incurred in the course of his employment. His entitlement to such sums was disputed in an answer filed by the Respondent in April 2011.

The claim was initially considered at a Pre-Hearing Review and was directed to go forward to a full hearing. That hearing took place on 15 August 2011 before Employment Judge Sigsworth, sitting alone at the London Central Employment Tribunal. The learned Employment Judge considered but dismissed the claim for unpaid expenses. Judge Sigsworth was not satisfied that the claim had been established by any evidence and accordingly was not made out.

26. The Claimant appeals on the basis he had been let down by his solicitors in respect of their preparation of that part of his case and their failure to attend the hearing. He contended that the hearing ought to have been adjourned. He had indeed made an application for an adjournment, but it had been refused. By its response to the appeal, the Respondent contends that the Employment Judge dealt appropriately with the case and was right to both refuse the adjournment and to dismiss the claim. Further, and more recently, advised now by Mr Rees, the Respondent has identified a point of law that it has pursued by way of cross-appeal. The contention, essentially, is that the Tribunal had in any event no jurisdiction to entertain the claim. That is because the relevant statutory definition of 'wages' expressly excludes expenses, in particular those expenses incurred by the worker in carrying out his employment. By the cross-appeal Mr Rees contends that even if the case had been expressed in the alternative as a breach-of-contract claim, the Tribunal had no jurisdiction to entertain it because the Claimant was still an employee of the Respondent. The Notice of Cross-Appeal recognised that this point as to jurisdiction had not been taken before Employment Judge Sigsworth but nevertheless pressed it as it required no determination of any facts and went to the legal foundation of the Employment Judge's Judgment.

27. Mr Ustych, appearing for the Claimant, candidly acknowledged the force of the cross-appeal. He conceded that the Tribunal had to this extent proceeded without jurisdiction and further that the Employment Tribunals Service had no jurisdiction to entertain the expenses claim. In those circumstances, it must follow that the second appeal is dismissed, and I make that order. Moreover, it appears to follow that the expenses element of the Claimant's claim must likewise be dismissed but I shall hear the representatives of the parties before finally making an order to that effect.