Appeal No. UKEAT/0500/12/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 June 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MRS C BAELZ

MR D NORMAN

MR R VORALIA T/A RTS TEXTILES RECYCLERS — APPELLANT

MR J OSOWSKI — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR AYOADE ELESINNLA (of Counsel) Instructed by: Concilium International Unit 4 Central Park Estate Staines Road Hounslow TW4 5DJ

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The Employment Tribunal did not err in exercising their discretion to strike out an ET3 in circumstances in which on the evidence before them they could conclude that the failure to comply with an order to disclose documents was deliberate and persistent. The sanction of striking out the ET3 Response was within the discretion of the ET it was not disproportionate. **Blockbuster Entertainment Ltd v James** [2006] IRLR 630 considered.

THE HONOURABLE MRS JUSTICE SLADE DBE

Introduction

1. Mr Voralia, trading as RTS Textiles Recyclers, the Respondent, appeals from the order and Judgment of an Employment Tribunal sent to the parties striking out the Respondent's response and debarring him from the proceedings. The Claimant, who was employed by the Respondent as a driver, brought proceedings for unfair dismissal and money claims. He contended that he was dismissed because he reported the Respondent to Her Majesty's Customs and Excise. In his Particulars of Claim relating to unfair dismissal for making a protected disclosure he says:

> **"The Respondent dismissed the Claimant because the Claimant reported the Respondent to HMRC for:**
>
> **(a) providing the Claimant with payslips which were completely false in content;**
>
> **(b) failing to deduct income tax and National Insurance from the Claimant's wages and account for the same to the HMRC;**
>
> **(c) contrary to the National Minimum Wage Regulations the Claimant was paid below the NMW stipulated rate of £5.93/hour; and**
>
> **(d) contrary to the Working Time Regulations he was made to work for more than 10 hours a day (50 hours per week), without any rest breaks;**
>
> **(e) unlawful deductions of wages made by the Respondent."**

2. The Claimant stated that his wages were paid each week by two cheques and that tax and National Insurance contributions were only paid on one. The Respondent in his ET3 denied that the Claimant was dismissed. He alleged that tax and National Insurance Payments were made to HMRC and that this was shown on itemised pay statements. He denied that the Claimant made any disclosures to HMRC regarding payment of tax and National Insurance.

Background

3. The claims came before an Employment Tribunal for a full hearing on 4 April 2012. The hearing was adjourned to 22 June 2012, and in the Reasons sent to the parties after that hearing on 18 April 2012 the Employment Tribunal recorded this at paragraph 3:

> **"On reading this material, it appeared to us that there was a serious possibility that the relationship between the parties was tainted by illegality. Witnesses on behalf of the Claimant gave evidence that employees of the Respondent received two simultaneous payslips in respect of the same periods of employment. This was verified from copies of the payslips in the Respondent's bundle. Mr Voralia did not dispute that that system was operated."**

4. The Tribunal at the hearing on 4 April 2012 made a number of orders. The material orders for the purpose of this appeal are as follows:

> **"No later than 27 April 2012 the parties will give the following disclosure by list and copy to each other:–**
>
> **4.1 The Respondent will send to the Claimant records of payment of tax and national insurance for all its warehouse and driver staff in the tax years 2010/2011 and 2011/2012. National insurance numbers may be redacted.**
>
> **4.2 The Respondent will send to the Claimant copies of Form P11D and verification from its accountants of payments made to HMRC in respect of tax and national insurance."**

Submissions

5. It is not said by Mr Rees, on behalf of the Respondent, that these requirements were complied with; they were not complied with by the Respondent. When matters came back for hearing on 22 June 2012, the case proceeded on the basis of the agreed facts set out in paragraph 3 of the earlier Reasons given by the Tribunal following the hearing on 4 April. At the hearing on 22 June the parties, were asked whether there was any respect in which each party considered that the other had failed to comply with the order made on 4 April 2012. It is agreed by Mr Rees that the Respondent had not complied with paragraphs 4.1 and 4.2 of the order. The Employment Tribunal asked the Respondent's representative to show cause why the

Response, the ET3, should not be struck out. At paragraph 14 the Employment Tribunal record:

> **"Mr Joshi [the Respondent's representative] pointed out that strike out is a discretionary remedy which if granted could leave the Claimant with a windfall to which he was not entitled. He pointed out that the Claimant himself had not given full disclosure and stated (on a point on which he had our near complete sympathy) that he had been distracted from the task of compliance by repeated and near abusive letters from Mr Lukomski [the Claimant's representative]."**

6. Mr Rees acknowledged that the repeated and near-abusive letters referred to were the only explanation offered to the Tribunal for the default of the Respondent in compliance with the order made on 4 April. Further, it is acknowledged by Mr Rees that the letters referred to in paragraph 14 of the record of Mr Joshi's, the Respondent's representative's, comments were letters sent from the Claimant's representative to the Respondent's representative, not to the Respondent himself. That is the reason why Mr Joshi said there had been distraction from the task of compliance with the orders.

7. At the hearing on 22 June there was no application by the Respondent for an adjournment to enable them to obtain the documents, nor was there any suggestion that they would be produced. It is not suggested by Mr Rees that the documents provided by the Respondent at the hearing and referred to in the Judgment were documents that complied with the orders previously made. The Employment Tribunal held:

> **"16.3 The Respondent's failure to comply with the April order was made without good excuse or cause;**
>
> **16.4 To adjourn this hearing would have been disproportionate to the resources of the Tribunal and the potential value of the claim (which was inherently a claim of modest value, the Claimant having suffered only nine weeks unemployment). […]**
>
> **16.6 Proceeding today on the basis of non compliance would allow the Respondent to take part in proceedings on the footing of non compliance with an earlier case management order, and would expose the Claimant to the very prejudice which our April Order had sought to avoid."**

8. The Employment Tribunal then struck out the ET3 response and debarred the Respondent from further participation in the proceedings.

9. Mr Rees, for the Respondent, contends that the Employment Tribunal erred in that they failed to apply the case of **Blockbuster Entertainment v James** [2006] IRLR 630, in which Sedley LJ at paragraph 5 made certain observations and gave guidance on the approach to the power to strike-out. Mr Rees comments that the Employment Tribunal did not find that the Respondent was "in deliberate and persistent disregard of the orders". "Deliberate and persistent disregard of required procedural steps" was referred to by Sedley LJ as one of the two cardinal conditions preceding a strike-out. Further, it was said by Mr Rees that the Employment Tribunal failed, as they should have applying **James**, to consider whether if there had been a deliberate and persistent disregard for orders, that striking-out was a proportionate response. Sedley LJ in **James** had said that if one of the two preconditions he referred to had been satisfied, it is also necessary to consider whether striking-out is a proportionate response. Mr Rees contended that striking-out was not a proportionate response and that a costs or preparation order would have been the appropriate sanction for the non-compliance.

10. Mr Elesinnla, counsel for the Claimant, submits that the Employment Tribunal did not err in law or in their exercise of their discretion to strike out the Respondent's response. Rule 18(7)(c) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** was to be applied. **James** gives guidance. In this case, there was non-compliance with orders made by the Employment Tribunal and no reason advanced by the Respondent for that non-compliance. Mr Elesinnla recognised that the sanction of striking-out may be viewed as harsh, but it was within the bounds of the reasonable exercise of discretion of the Employment Tribunal to apply.

Discussion and conclusion

11. The Respondent has admitted that it was in breach of orders made by the Employment Tribunal on 4 April 2012. The disclosure ordered in paragraphs 4.1 and 4.2 went to the heart of the issue of illegality that was to be considered by the Employment Tribunal. Further, since the claim made by the Claimant was for unfair dismissal because of a protected disclosure, consideration of **Employment Rights Act 1996** section 43B(1)(b) requires that under section 43C(1) disclosure must be made in good faith in order for it to be a protected disclosure. It is therefore material that the Claimant shows grounds for disclosure that are in good faith. Clearly documentation which supports the contention that the Respondent had committed misdeeds that were reported to the HMRC would be relevant to show good faith.

12. As for whether the Tribunal found or were entitled to proceed on the basis that the breach of the order was deliberate and persistent, the Respondent gave no indication to the Employment Tribunal that they would comply with the order. There was no request for an adjournment or statement that in a few days or within a short while the documents would be produced. More than two months had passed since the order was made, and many weeks since the deadline for compliance had passed. No reason was advanced for non-compliance. Letters to the Respondent's representative that were advanced by Mr Joshi as a reason why there was interference with preparation of the documents is not an excuse; it was the Respondent who was to comply with the order, and no doubt it, and not their representative, had those documents.

13. In our judgment, the Employment Tribunal inevitably came to the conclusion that rule 18(7)(c) was satisfied. The fact that the Employment Tribunal did not use the words "deliberate and persistent", in our judgment, is not material. The only inference from the

Judgment of the Employment Tribunal and the facts and events set out therein is that the Tribunal considered the situation before them to be evidence of a deliberate and persistent breach by the Respondent of the order of 4 April 2012.

14. As to whether the sanction of striking out the response was proportionate, in our judgment that sanction was within the discretion of the Employment Tribunal. The Tribunal was faced with a deliberate disobedience of an order of the court; it was an important, not an insignificant, order, and there was no indication that compliance would be forthcoming. No costs order could be made under rule 40(2) of the Employment Tribunal Rules, as the Claimant was not represented. In our judgment there is no reason to consider that the Employment Tribunal imposed a sanction that was disproportionate by not making a preparation time order, which we are told would be £33 per hour, instead of striking out the ET3.

15. The order made by this Employment Tribunal was well within their discretion and powers to make. There is no error of law or wrong exercise of discretion, and the appeal is dismissed.