Appeal No. UKEAT/0425/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 December 2012

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MS H SHAW — APPELLANT

(1) THE CEDAR TREE HOTEL
(2) ST6 LTD
(3) SUTTON GROSVENOR LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL BOWNES (Solicitor) Eddowes, Perry & Osbourne 52 High Street Sutton Coldfield West Midlands B72 1UQ
For the Respondent	MR JAI PREET (Representative)

SUMMARY

PRACTICE AND PROCEDURE

Striking-out/dismissal

Review

A response form was struck out for non-compliance with an unless order. No reasons were given in a subsequent hearing for restoring the Respondent. Without dissent, the EAT amended the proceedings to substitute the correct Respondent and restored the strike-out against it. **Cocking v Sandhurst (Stationers) Ltd** and **Watts v Seven Kings Motor Co Ltd** applied.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about Employment Tribunal procedure in amending a response form. Behind it, however, are other procedural measures. I will refer to the parties as the Claimant and the company, Sutton Grosvenor.

Introduction

2. It is an appeal by the Claimant in those proceedings against a Judgment of Employment Judge Crump, sitting at Birmingham, on 21 February 2012 on a review of a Judgment. The Reasons were sent to the parties on 14 May 2012. The Respondents were there, in the form of Mr J Preet, who is described as a director of ST6 Ltd and Sutton Grosvenor Ltd. Those are both corporations and are both relevant in the proceedings. The Cedar Tree Hotel is where the Claimant worked, and the response was sent by Mr Preet in the name of the Cedar Tree Hotel. Indeed, even after it was determined, this time by Employment Judge Camp, that Sutton Grosvenor Ltd was the Respondent, Mr Preet, acting as the Respondent in the proceedings, signs as the Cedar Tree Hotel. The Cedar Tree Hotel is not a legal entity.

Procedural background

3. The Claimant claimed that shortly after the takeover of the hotel she resigned, and in a Judgment given by Employment Judge Crump, the first Judgment, on 16 February 2011, with Reasons sent on 22 February 2011, an award of £26,111.28 was made in respect of claims of unfair dismissal and unlawful deductions of wages. The company was not present or represented. It does not say it is a default Judgment. Mr Bownes, trainee solicitor, now qualified, appeared for the Claimant, as he does before me, and argued the point. I asked him today for an explanation of why the company was not present, and he has produced relevant

orders of the Tribunal. The first is from Employment Judge Cox, who ordered that unless the company obeyed the orders as to witness statements the response would be struck out on 11 February 2011, and a costs warning was given. There was no compliance with the order, and so Employment Judge Goodier, this time, ordered that the response was struck out in accordance with the unless order. The hearing then went ahead in accordance with the directions given by Judge Goodier and previous directions, leading to what I have described as the first judgment.

4. The Claimant sought a review of that decision, because for her part there appeared to be some doubt about her ability to enforce it. Sutton Grosvenor Ltd is mentioned for the first time in correspondence with the Tribunal some time thereafter. On 30 December 2011 the case came on for a PHR before Employment Judge Kearsley to decide which was the correct employer as between Sutton Grosvenor Ltd, ST6 and the Cedar Tree Hotel, still as the Respondent. That was aborted.

5. On 21 February 2012 the case came on for hearing of the Claimant's review application; this is the subject of the appeal. The Judge records that the sole issue before him was the Claimant's application to review it and simply order that there be substitution of ST6 for "Cedar Tree Ltd". Mr Preet objected to that and said that it was to be "Sutton Grosvenor Hotel Ltd". I do not know whether that is the same as Sutton Grosvenor Ltd; anyway, that was his contention. The Judge decided that it was just and equitable to extend the period in order for the Claimant to seek a review; there is no challenge to that. The Judge could not decide as between ST6 Ltd and Sutton Grosvenor Ltd which, if either of them, employed the Claimant, and then he said this:

> **"In those circumstances, I have decided that I will revoke my earlier Judgment and will join and allow the claim to proceed against ST6 Ltd and Sutton Grosvenor Ltd."**

6. The outcome was that that issue was hived off to be determined at a further PHR, which eventually took place at the third hearing, which was before Employment Judge Camp, where it was definitively decided that the Respondent was Sutton Grosvenor Ltd.

The appeal

7. The point about today's proceedings is that the Judge revoked the earlier order. Mr Preet has told me that Judge Crump, at his second hearing, heard no submissions, argument or evidence about why the response should have been accepted from Sutton Grosvenor Ltd; in other words, there was no debate and finding seeking to revoke the orders of Employment Judges Cox and Goodier striking out the response.

Discussion

8. The position, as I see it, is that Sutton Grosvenor Ltd has at all times been the correct Respondent, albeit misnamed in the proceedings, and the criticisms of it for failing to comply with Employment Tribunal orders apply across the board. In reality, there is no injustice here; Mr Preet is the leading light in the two companies, and he acts on their behalf. He tells me, and I have some sympathy for him, that they ran out of money in order to instruct the solicitors, but that does not excuse their failure to comply, and there was no compliance prior to Judge Crump descending on this case.

9. There are no reasons given for the revocation of the order made in favour of the Claimant. That in itself is an error of law, as Mr Bownes correctly submits: see rule 30. It would be impossible for Judge Crump to have decided whether or not it was correct to strike out the response, because nothing happened on that day, directed at the finding that the

company had failed to comply with the orders of the Tribunal, such as to unseat the order of the previous two Judges. That in itself is an error of law.

10. In my judgement, what should have happened in this case is what Mr Bownes submits in his skeleton argument, which is to rely upon the Judgment of Sir John Donaldson, President of the NIRC, in **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650. In reality, this is an amendment to the response to deal with the misnaming of the Respondent. The way in which this is dealt with is in his sixth principle at page 657, which says as follows:

> **"In deciding whether or not to exercise their discretion to allow an amendment which will add or substitute a new party, the tribunal should only do so if they are satisfied that the mistake ought to be corrected was a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identity of the person intending to claim or, as the case may be, to be claimed against.**
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> **In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added."**

11. In these circumstances, the power to make an amendment is clearly set out. Our case today is very similar to the facts in **Watts v Seven Kings Motor Co Ltd** [1983] ICR 135, and Browne-Wilkinson J, President, came to the very practical solution, if I may say so, that if a mistake were genuine and it could be corrected, and there was no reasonable doubt as to the identity of the person claimed against, the response can be amended by the substitution of the correct Respondent long after a Judgment was made, for he said this:

> **"It seems to us that there was no reason why, albeit that a decision had already been given, Mr Alan Reynolds should not have been joined as a party to the original proceedings which had been started against the limited company within the time limited […]. We can see no reason, in principle, why these proceedings should not have been amended so as to substitute, as the respondent to proceedings started within time, the true employer against whom both the IT1 and the particulars given under it showed was the person against whom the claim was intended to be made […]."**

12. The power to substitute is plainly recognised in those authorities. Mr Preet's sole response in the company's answer to the appeal is that he relies on the Judge, but the difficulty for him is that the Judge has given no reasons. In the absence of reasons there is an error of law, and so the question for me is whether the case should go back to an Employment Tribunal or should be decided by me. Mr Bownes submits that the practical way forward is for me to decide the issue, and Mr Preet does not dissent from that; so, that is what I will do. There is no reason to go back on the original striking-out order. Sutton Grosvenor Ltd remains struck out of these proceedings, and the order given by Employment Judge Crump in his first Judgment remains now against Sutton Grosvenor Ltd. The amendment provided by the Judgment of Employment Judge Camp is effective to secure the substitution. The Judgments of Judges Cox and Goodier remain in place so as to secure the striking-out of the response, and that is all that is required. The appeal is allowed.