Appeal No. UKEATPA/1163/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 April 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MS M POPE — APPELLANT

(1) RISE (REFUGE, INFORMATION, SUPPORT & EDUCATION)
(2) MS A McCAFFERTY
(3) MS G GRAY
(4) MS J SPRAY — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MR C MILSOM (of Counsel) (Appearing under the Employment Law Appeal Advice Scheme)

SUMMARY

CONTRACT OF EMPLOYMENT – Notice and pay in lieu

The Employment Judge permissibly refused to allow the Claimant to amend her claim to add wrongful dismissal as it was an attempt to argue unfair dismissal, for which she lacked one year's employment. But even if she were allowed to argue this, the papers indicated she had been paid her notice money in full so the claim would have been struck out anyway.

Observation:
The Claimant did not attend so could not instruct counsel on the ELAA Scheme who did attend and had prepared the case. This is a waste of resources and goodwill.

HIS HONOUR JUDGE McMULLEN QC

1. This is an appeal brought by Ms Pope who is not present today. She had indicated she was happy to accept Mr Christopher Milsom of counsel acting on her behalf under the ELAA Scheme but, of course, the protocol under that scheme requires she be present and she has phoned the Tribunal this morning to say she is not coming. She is on the email traffic which has come to me and I hold is content for this case to go ahead in her absence but, of course, without the assistance of Mr Milsom.

2. This is a thousand pities. Mr Milsom is one of many busy advocates who support the EAT, and I say that deliberately, by giving their services for free to those people who could not come and present a serious legal argument. It may seem paradoxical that we see many hopeless cases and it might be better for our well being if we threw them all out if there was no re-application under rule 3(10) when they have been rejected by a Judge under rule 3(7). But it is one of the privileges of sitting in this court that we maintain the ELAA Scheme, so that someone can come and put a point that may have been buried in a hopeless appeal.

3. However, that takes time, administrative resources of the EAT and the goodwill of members of the Bar and solicitors. Here is Mr Milsom today prepared to run an argument before me which as a matter of fact corresponds to an observation made by Judge David Richardson on his rule 3(7) sift and which I have shared with him. But it is a waste of his time. I am very grateful to him and so should Ms Pope be. If this ungracious practice spreads, we will lose the goodwill of those specialists giving of their time.

4. Now, the upshot is that Judge Richardson asked Regional Employment Judge Peters to give reasons. He threw out of a large part of the Claimant's case but one outstanding matter is

that she wishes to make a claim for wrongful dismissal. The judge rejected the application in his discretion, indicating that she was effectively bringing a claim of unfair dismissal under the heading of wrongful dismissal and she cannot bring a claim of ordinary unfair dismissal because she lacked one year's continuous employment. As to the exercise of that discretion, HHJ Peter Clark formed the following opinion:

> **"Whereas the form of amendment to add a claim of breach of contract (wrongful dismissal) might have referred specifically to unpaid notice pay, it did not. The Employment Judge formed the view (reasons para.9) that this was an attempt by the Claimant to argue her claim of 'ordinary' unfair dismissal, for which she did not have the necessary qualifying service, through a claim for wrongful dismissal. That is not permissible and in these circumstances the Employment Judge was right to refuse permission to amend."**

5. This was a re-application following Judge Richardson's finding. The basis upon which the Employment Judge rejected it is one which I consider to be unimpeachable. This is an attempt to bring an unfair dismissal claim. However, the basis of the Claimant's case which is the only part which is exigible today is that she claims notice pay. She wrote that in her claim form; she claimed she had been given three weeks and she was four days short between and 1 and 6 June 2011. She puts that as an unauthorised deduction claim. She is bound to run into the buffers; see **Delaney v Staples** as Judge Richardson noted in his reasons for his decision in seeking further reasons from the Judge. But the response of the Respondent in writing is the Claimant was given on 6 May 2011 one month's money in lieu of notice and dismissed summarily.

6. On the papers there is therefore an issue about the additional week. There may also be an issue about what the proper notice was. Assuming from the wording of the response that invokes the dismissal letter, and the Claimant's claim that she got three weeks and is four days short, I will infer the period of notice would be four weeks or one month. In order for the Claimant to make this good she would need to show that indeed she was paid less than she was due; I am sceptical about this. The major part of the Claimant's case today is to do exactly

what Judge Peters said she was trying to do which was to run an ordinary unfair dismissal claim. If in due course the Respondent shows it paid the money that was due under the contract this will be hopeless. Given the Claimant has produced voluminous paperwork before me today, but not what I hold to be relevant material, I consider that the result the Judge achieved is correct for the reason he gave and also for this reason: if the Respondent shows that she was paid either four weeks or one month's pay there will be no claim for wrongful dismissal, which is failure to pay the notice pay. The Claimant seems to be of the view that wrongful dismissal is much wider than that but as the Judge correctly noted it is a claim for failing to pay the money under the contract due on termination and it would only arise if there was indeed a wrongful dismissal.

7. It seems to me that the Judge would have been correct had he said that even if the claim were re-labelled to be a notice claim, it would be struck out as an abuse of process because she has already been paid it. So on that basis I will not take this matter any further but I will give the Claimant the opportunity to seek a review of this Judgment if my assumptions about the paperwork prove to be incorrect and she has 14 days to apply.