Appeal No. UKEATPA/0250/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 April 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MRS N CHEEMA AND MR J SINGH T/A JS CARPETS — APPELLANTS

MR K KUMAR — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

AMENDED

APPEARANCES

For the Appellants	Written submissions by the first Appellant
For the Respondent	MR K KUMAR (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE

Disclosure

Postponement or stay

The medical evidence in support of one Appellant's application for a postponement of the EAT hearing was rejected. The application for disclosure was refused. The application under rule 3 against the Employment Tribunal's refusal on review to vary its judgment disclosed no error of law.

HIS HONOUR JUDGE McMULLEN QC

1. Having given generic directions in the three rule 3 cases in my list this morning I now turn to the last which is the case of Cheema and Singh against Kumar. I will refer to the parties as the Respondents and the Claimant.

2. In **Haritaki v SEEDA** [2008] IRLR 945 at paragraphs 1-13 I set out my approach to hearings under rule 3; it should be read with this Judgment. That approach has been approved by the Court of Appeal on a number of occasions, for example, **Hooper v Sherborne School** [2010] EWCA Civ 1266 and **Evans v University of Oxford** [2010] EWCA Civ 1240. On the sift of this Notice of Appeal in accordance with Practice Direction paragraph 9, Wilkie J exercised his power under rule 3(7) of the EAT rules. He concluded in chambers that the case disclosed no reasonable grounds for bringing the appeal. Where no point of law is found, s21 of the Employment Tribunals Act deprives the EAT of jurisdiction to hear the case. The Appellants were given the opportunity to amend the Notice of Appeal or to have the case heard before a Judge under rules 3(8) or 3(10). They did both. HHJ Peter Clark formed the same opinion.

3. I am thus hearing the case on more material than was available to the Appellate Judges and I form my own view of the appeal. The question for me is whether there are any or no reasonable grounds in the appeal. If there is, I will stop the hearing and order a preliminary or full hearing, if there is none, I will dismiss the case.

4. The facts in this case are that the Claimant contended that he was unfairly dismissed by the Respondents. The correct name of them is Mrs N Cheema and J Singh trading as JS Carpets, that is not a company and so they are individual Respondents to these proceedings.

The Claimant made a number of claims for monetary payments arising out of his engagement by the Respondents as a carpet estimator in the Slough/West London area. The Claimant would receive instructions to go and measure up houses for new carpets, he would report back to the Respondents and an estimate would be given by Mr Singh for the cost of installing a carpet. Parties fell out and the Claimant contended he was unfairly dismissed. The Employment Tribunal have first to consider whether or not he was an employee with the requisite one year's service.

5. This matter was resolved at a hearing before Employment Judge Wyeth on 5 April 2011 for reasons sent to the parties on 28 April 2011. The Judgment was that the Claimant had sufficient service to bring a complaint of unfair dismissal; that means the Tribunal upheld his claim that he had been employed from 1 March 2010 until his dismissal summarily on 14 July 2010 so he had two years' employment. The case was then listed and the issues were set out by Employment Judge Wyeth so that the case came on before Employment Judge Mahoney and members on 26 and 27 July 2011. The Tribunal upheld the Claimant's claim in full and awarded him for unfair dismissal £9,125 and further sums in respect of the monetary claims he made, giving a total award of £13,000 odd.

6. There was no appeal by the Respondents against either Judge Wyeth's or Judge Mahoney's Judgments. Instead the Respondents sought a review, at the same time a costs application was made. The Claimant had been assisted by Mr Khan, a legal executive; the Respondents had been represented by Mr Rahman, a consultant. Mrs Cheema, the first Respondent is a solicitor, a specialist in immigration law, as she asserts on many occasions in the voluminous correspondence which she generates. The Tribunal decided that it would refuse the Respondents' application for a review; this is a plain error because as the document itself shows on 3 January 2012 the three person Tribunal convened at Watford for a hearing and

decided to uphold its original Judgment. Thus, the correct order was that the application for review was granted but the Judgment remained unvaried.

7. The basis of the application for review was a contention by the Respondents that the Claimant had been working illegally for he was subject to immigration control and could not enforce the contract. Notwithstanding that this matter had been dealt with at the two previous hearings in the Claimant's favour, the Employment Tribunal took the evidence of the Respondents. In doing so it had examined the disclosure documents which it had ordered in order to hear the review and the Tribunal said this:

> **"6. The findings of fact of the tribunal in respect of this application are in a small compass. We had before us a document, page 30 of the bundle R2, which showed that on 1 April 2008 UK entry clearance, determined in New Delhi, granted to the claimant a visa to join his spouse in the United Kingdom and that visa was valid until 3 April 2011. We also had before us today the wedding certificate of the claimant showing that he was, in fact, married in India on 24 March 2008 and his spouse was someone who at that time, had entitlement to work in the United Kingdom.**
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> **7. In its full merits hearing judgment, the tribunal indicated that the claimant had started work in March 2008 (the relevant date now shown to be 1 March 2008). It is therefore clear that the only illegality that can be contended for by the respondent relates any employment in March 2008.**
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> **8. It is clear from the date stamps on the claimant's passport that he did not return to the United Kingdom after his marriage until May 2008. To have flown to India for his marriage he would have had to leave the UK in the middle of March. So it is only the first two or three weeks of March 2008 which are relevant to this case. The claimant says to the tribunal that prior to March 2008 he had a current application for renewal of his student visa which would have entitled him to work 20 hours a week and therefore there has been no illegality at all.**
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> **9. The respondent asserts that, on the basis of the tribunal's findings that he was working 3.5 days a week, there has been illegality.**
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> **10. The tribunal has no hesitation in rejecting the application for a review on the basis and it is quite clear to the tribunal that the claimant only worked for about two weeks before he went to India to get married. If one averages out the hours in that month of March, he must have worked less than 20 hours a week. It is quite clear from the documentation that from 1 April 2008 he was entitled to work in this country.**
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> **11. Even if we are wrong about that, on the basis of the legal authorities which Mr Rahnan very kindly put before us we do not consider that this comes anywhere near the facts as shown in *V v Addev and Stanhope School*. This is a case right at the other end of the spectrum. At worst it is a misunderstanding, possibly a serious misunderstanding by the claimant, but it is on any view a trivial breach of the rules in relation to his entitlement to employment, particularly bearing in mind that on the balance of probabilities, he was entitled to work 20 hours a week as he had an application still pending for an extension of a student visa. The tribunal had evidence before it to that effect.**
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> **12. We do, however, make the point that this could have been cleared up much earlier had the claimant taken more assertive steps to obtain his passport back from the UK Border Agency and complied with the tribunal's order dated 30 November 2011 requiring him to serve clear photocopies of all the pages of his passport as opposed to some of them, by 12 December 2012. He did however comply with the order in respect of providing a copy of his marriage**

certificate. Clearly he could not provide the original passport because it was still held by the UK Border Agency.

13. So, in those circumstances we have no hesitation in saying that the interests of justice do not require a review of our judgment and that judgment stands."

8. As can be seen, there is some criticism of the Claimant for not being as candid as he might have been. Nevertheless, the Tribunal having conducted a review rejected the contention that there was illegal working so as to preclude the Claimant enforcing his monetary claims and his claim for unfair dismissal. The second part of the hearing on that day was an application by the Claimant for costs which succeeded. The Tribunal awarded £2,460 against the Respondents.

9. It is against those orders that the Respondents appeal. In the meantime, proceedings have gone on in the High Court by the Claimant to enforce the order. The matter came before the High Court which stayed it as I understand it pending the outcome of the appeal to the EAT. In tandem there was a claim by the Claimant and his business arising out of part of this relationship which is alluded to in the Judgments. That is an attempt by the Claimant to buy out part of the Respondents' business; this involved, I understand, the payment of a deposit on the contract. When the matter was resolved, the Claimant sought return of his deposit which was refused. He went to court, the Respondents on four occasions were granted adjournments for one reason or another but in due course the case was listed to be heard. The Respondents eventually folded and have paid the Claimant and his business partner what they owed him under the aborted deal.

10. Mrs Cheema refers to the fact that the Claimant has had his money. This, in my judgment, is an attempt to mislead the EAT. He has not had his money. The latest emanation from Mrs Cheema is that her solicitors hold the money in the Tribunal proceedings on trust for the Claimant. This matter came before HHJ Peter Clark. The Respondents had made previous applications for adjournments which had been granted in their favour, but on the penultimate

occasion Judge Clark refused it, ordered that the matter be heard today as it had been in the list for some time and acknowledged that adjournments have been granted in Mrs Cheema's favour as sought and that Mr Kumar was being kept out of his money.

11. The situation developed so that the EAT late last Thursday night, the court having been closed at lunchtime for Maundy Thursday, received an email from Mrs Cheema in which she asserts that she fell down the stairs. She included two pieces of documentation from medical practitioners in Vancouver, British Columbia. The first bearing the stamp of Dr John S Corey records that she fell down the stairs and seems to exhibit pain in the spine, although I cannot quite read the report. The report, however, is simply a requisition to radiologists to take an x-ray. On the same day, 28 March 2013, what I take it to be a medical certificate is produced by Dr Corey which so far as I can tell says, "Please excuse Neelam from her travels for medical reasons" and on the basis of this, Ms Cheema seeks to vacate today's hearing. The matter came before me yesterday and I decided to have the matter stood over to today for also included within the application made by Mrs Cheema on 28 March is one to do with obtaining disclosure from the Claimant, from the UKBA and from the Claimant's previous employer, Paperchase, of certain records.

12. When the case was called on today, Mr Kumar was here. He is entitled to be heard on the application relating to disclosure for what is sought is an order against him. He is also entitled to be heard on the application to vacate today because, as Judge Clark noted, he is being kept out of his money and he has an interest in the expeditious despatch of these proceedings. I heard him on both of them.

The postponement

13. First I will deal with the application to vacate. As Mr Kumar points out this is now the fourth occasion when an application has been made. All sorts of different reasons have been given but one of the earlier ones was that a complaint was being made by Ms Cheema to the ombudsman about the Employment Tribunal and about the EAT. I have no record of any complaint against the EAT. But in any event, the Registrar decided that any complaints that there may be to the ombudsman would not hold up the decision on a question of law before the EAT over which the ombudsman has no jurisdiction. There were also complaints about the Respondent's general condition and it is fair to say that the Registrar granted a further three months for the Respondent, she then appearing to be in Vancouver. But Judge Clark decided on the last occasion on 18 March that this case would still stay in the list for today.

14. Mr Kumar says this is yet another example of the Respondents' delaying tactics. He cites to me the delays in the hearings at Slough County Court for the return of his deposit on the business contract, the previous applications before this court and also the fact that Ms Cheema has produced evidence but nothing from Mr Singh. This was a point I made yesterday because there still is no material indicating why the joint Respondent should not be here to present the case. As a matter of law they are jointly and severally liable and there is no evidence before me as to why the case should not proceed in respect of Mr Singh.

15. Furthermore, I am sceptical about the medical evidence sent by Ms Cheema. The doctor does not indicate his medical opinion as to what the condition is and for how long it is likely to continue and why it prevents her travelling for a court hearing today. Mr Kumar submits that there is no corroborative material by way of air tickets indicating that Ms Cheema was booked on a flight which she has had to cancel. I bear in mind that she has been found to be a liar and so has Mr Singh by the Employment Tribunal in its substantive findings against which there is

no appeal. She takes it very seriously because she is a solicitor but those remain the findings. In the light of that and of what I have already found to be misleading material put before me as to the satisfaction of the Claimants debt in the Tribunal, I do not accept the material placed before me as a sufficient reason for not holding this rule 3 hearing into the joint Respondents' application and Notice of Appeal.

Disclosure

16. I then turn to the disclosure point because this is said to be relevant to the appeal. Mr Kumar contends that this matter has already been dealt with by the Employment Tribunal and is a yet further delaying tactic. I agree with him. The first point to note is that it was concluded as long ago as 5 April 2011 that the Claimant was an employee with sufficient continuous employment and entitled to bring his claim. There is no contention that the Claimant was illegally employed. I bear in mind Ms Cheema is a specialist immigration solicitor and she herself asserts that she would have checked the relevant records. And so the opportunity has come and gone in 2011 to challenge the finding that the Claimant was an employee, entitled to bring a claim and is not disqualified by reason of illegality.

17. The same is true of the position on the disclosure application. As to the material itself, this is precisely the material which was canvassed before the three person Tribunal under Judge Mahoney on the review because then the parties were unarguably directed to the illegality issue concerning the immigration status of the Claimant. Documents were produced, and examined by the Tribunal; its conclusion on review is set out above. This new application, therefore, goes over old ground and in my judgment there is no reason for it to be ordered. I accept Mr Kumar's submission that this is yet a further attempt to delay matters. It is not in the interests of justice nor in accordance with the overriding objective that this court should make an order for disclosure and I dismiss that application.

The Rule 3 application

18. That now leaves the rule 3 application and it will be borne in mind that this is against the review judgment. I hold that the Employment Tribunal had the proper test in mind for a review, that it was looking at whether the interests of justice required a review and subject to the technical criticism I made it conducted a review and refused to change its position. This case came before Wilkie J who formed the view that it was hopeless because he said this:

> **"This is hopeless. On any view the illegality ran from 1st March to 1st April 2008. He was not dismissed until 2010. The claim arose out of employment which had been lawful for over 2 years. The application for review was without merit and the Employment Judge did not arguably err in law in refusing it."**

19. As much was thought by HHJ Peter Clark and in my judgment, which I exercise independently of those two Appellate Judges, I reach the same conclusion.

20. The Tribunal was entitled to look at the documents and to make allowances. It did not uphold the allegation of illegality but if there were any irregularity in the Claimant's immigration status it was for a matter of a few weeks. It took the view that that would not disentitle the Claimant from making his claim based upon the contract. There is no basis for asserting that the Employment Tribunal erred in law in refusing to change its judgment, having conducted the review. The order for costs was properly made in the circumstances given that the Respondents had lied to the Employment Tribunal.

21. The application made on 28 March 2013 by Ms Cheema indicates that should the applications for adjournment and disclosure be rejected she would wish to appeal to the Court of Appeal. There is no reason for this simple matter to be taken to the Court of Appeal, there is no compelling reason for it, nor is there any reasonable prospect of success. It may be

axiomatic that having formed that view under rule 3(10), I maintain the view the chances of success in the Court of Appeal will not improve. The two applications today for adjournment and disclosure are dismissed, the application under rule 3(10) is dismissed. The appeal will be taken no further.