Appeal No. UKEAT/0002/13/SM

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 May 2013

**Before**

## HIS HONOUR JUDGE PETER CLARK

**(SITTING ALONE)**

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MR T SEYMOUR — APPELLANT

FITNESS FIRST CLUBS LTD — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR T SEYMOUR<br>(The Appellant in Person) |
| For the Respondent | MR G SELF<br>(of Counsel)<br>Instructed by:<br>Preston Redman Solicitors<br>Hinton House<br>Hinton Road<br>Bournemouth<br>BH1 2EN |

**SUMMARY**

**PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity**

Whether Employment Judge failed to consider a claim raised by the Claimant at Pre-Hearing Review. On material before EAT the claim was not pursued. **Mensah** (CA) considered. Appeal dismissed.

**HIS HONOUR JUDGE PETER CLARK**

1. This case has been proceeding in the Leeds Employment Tribunal. The parties are Mr Seymour, Claimant, and Fitness First Clubs Limited, Respondent; I shall so describe them. The Claimant was employed by the Respondent as manager of their Huddersfield club from 11 July 2008 until his dismissal on 4 July 2012. He presented two forms ET1 to the Tribunal complaining of unauthorised deductions from wages (the wages claim), outstanding holiday pay (the holiday pay claim), and detrimental treatment on health and safety grounds (the health and safety complaint).

2. All claims were resisted and the claims were combined and came on for a Pre-Hearing Review (PHR) before Employment Judge Burton sitting alone on 18 September 2012. By a Judgment of that date the Judge struck out all claims, save for the holiday pay claim, on the grounds that they had no reasonable prospect of success (see **Employment Tribunals (Constitution and Rules of Procedure) Regulations** rule 18(7)(b)). Written Reasons were provided for that Judgment at the Claimant's request; they are dated 29 October 2012, and at paragraph 2 the Judge records:

> **"At the outset of the hearing, the Claimant confirmed that the claim was only for wages that he believed were due to him between 9th April 2012 and 4th July 2012."**

3. The Judge went on to conclude that the Claimant had no entitlement to wages for that period when he was absent from work without good excuse. I interpose that the outstanding holiday claim was later compromised between the parties and is no longer live.

4. The Claimant applied for a review of the original Judgment on 28 September. He wished to pursue his health and safety claim brought under section 44(1) of the **Employment Rights**

**Act 1996**. The review application was summarily rejected by the Judge on 5 October. His reason for doing so was stated to be:

> **"The contention now being advanced by the Claimant is entirely different from the way in which he put his case at that hearing."**

5. On 7 November 2012 the Claimant lodged an appeal to the EAT complaining that the Employment Judge had fallen into error by "overlooking a claim made in the Claimant's ET1s"; the health and safety complaint. In response, the Respondent contended that the Claimant did not pursue the health and safety complaint at the PHR and cross-appealed on the basis that the claim ought to have been dismissed by the Judge on withdrawal.

6. Subsequently the Respondent's solicitors wrote to the Employment Tribunal on 18 January 2013 themselves asking for a review of the Judgment promulgated on 18 September, on the basis of the Claimant's appeal, and the suggestion was as follows:

> **"We have consulted with Counsel who attended at the hearing before Employment Judge Burton and he has confirmed that the Claimant confirmed that he was not proceeding with the section 44 claim and accordingly the Tribunal went onto [sic] only consider the unlawful wages [sic] between 9 April and 4 July which encompassed the notice period. That recollection of Counsel is supported within the Reasons at paragraph 2."**

7. In response the Judge wrote on 6 February 2013:

> **"I do not think the proposed variation of the Judgment is appropriate. Your counsels recollection is correct. The object of this hearing was to ascertain and define the issues. It was your counsel who suggested that this may be a claim under Section 44 ERA. I went through that section with the Claimant. He confirmed that it had not been his intention to pursue such a claim. In these circumstances there was no such claim to withdraw or to dismiss."**

8. For completeness, Mr Self, now appearing on behalf of the Respondent, draws my attention within the bundle to the manuscript notes taken by Mr Doughty at the PHR, which includes this extract: "Assurances NOT s 44(1)(d) or (e) ERA".

9. As a result of that letter from the Employment Judge, the Respondent formally withdrew its cross-appeal. The appeal now comes before me for a full hearing pursuant to the directions of Langstaff P. There was no direction under paragraph 11 of the EAT Practice Direction for affidavits to be filed in connection with a suggestion of procedural irregularity, and no application for such a procedure to be invoked has been made by the Claimant who brings this appeal.

10. Having heard the helpful submissions, both of Mr Seymour and Mr Self, it seems to me that the critical question is: what happened to the health and safety complaint at the hearing in Leeds on 18 September last year? In the absence of evidence which can be tested in cross-examination, I am left in this position: there is a letter from the Employment Judge, the one of 6 February, which I have just set out, in which he states that counsel for the Respondent (then Mr Doughty) raised the section 44 label for the undoubted health and safety complaint raised in the Claimant's forms ET1. That is supported by what was asserted by the Respondent's solicitor in correspondence and more particularly by Mr Doughty's manuscript notes. The question then is whether that account is effectively challenged as a matter of fact by the Claimant. What he tells me is, "I was not listening to what Counsel said to the Employment Judge because he [Counsel] was not talking to me".

11. Mr Seymour has pointed out during the course of this hearing that he has a hearing defect in his right ear. Mr Doughty was sitting to his left, and he does not pursue the point that he was physically unable to hear the exchange between counsel and the Judge. In these circumstances, he is not in a position in submissions (and therefore necessarily in evidence) to gainsay the account that Judge Burton gives in his letter of 6 February, endorsing what is said by counsel then appearing for the Respondent.

12. In these circumstances, although I am not asked by either party to adjourn this appeal hearing for evidence to be filed, it seems to me that such a course would be unproductive. I therefore proceed on the basis that, far from being overlooked in the sense it was ignored or missed, the health and safety complaint was discussed at the PHR; it was counsel who proffered the section 44 label, and it was the clear understanding of the Employment Judge from his conversation with the Claimant that the Claimant did not intend to pursue that claim. He may well have had second thoughts, hence his review application subsequently, but that seems to me to be the factual position on which I must judge this appeal.

13. Was there a procedural irregularity; in particular, was the Claimant in some way prevented from pursuing his section 44 complaint at the PHR? In my judgment, the answer to that is no. I referred the parties to the Court of Appeal's decision in **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 for the proposition that there is no duty on an Employment Tribunal of its own motion to ensure that every allegation in an originating application (now form ET1) is dealt with, unless it has been expressly abandoned, even where the Claimant does not put forward evidence to make good the allegation or argues in support of it. The circumstances of that case were that a particular complaint raised in Mrs Mensah's originating application was not dealt with in evidence and argument before the Employment Tribunal and therefore not dealt with in their decision. On appeal to the EAT, a division presided over by Morison J, President, allowed the appeal and remitted that issue for rehearing by a fresh Tribunal. The Court of Appeal took a different view and overturned the EAT decision.

14. In the present case, on the factual circumstances as I find them to be, it seems to me that the Claimant had an opportunity to pursue his health and safety complaint at the PHR but did not do so. In these circumstances, applying the principle in **Mensah**, the Judge was entitled to

proceed on the basis that was not a live issue and to determine only the wages claim, the holiday pay matter having been put over.

15. In these circumstances, I am not persuaded that there is any procedural irregularity shown in this case, and accordingly this appeal fails and is dismissed.