Appeal No. UKEAT/0627/11/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 November 2012
Judgment handed down on 30 November 2012

Before

THE HONOURABLE MRS JUSTICE COX

(SITTING ALONE)

MS L WEBBER — APPELLANT

NHS DIRECT — RESPONDENT

Transcript of Proceedings

JUDGMENT

REVISED

APPEARANCES

For the Appellant	MR ALLAN ROBERTS (of Counsel) Instructed by: Royal College of Nursing Legal Services 3 Capital Court Bittern Road Sowton Industrial Estate Exeter EX2 7FW
For the Respondent	MS LUCY BONE (of Counsel) Instructed by: DAC Beachcroft LLP Solicitors Portwall Place Portwall Lane Portwall Bristol BS99 7UD

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The point in issue on the Claimant's appeal was the correct construction of her contract of employment, providing for pay protection following a reorganisation and her redeployment to a lower salary post. The Tribunal had to determine the correct reference period of earnings for the relevant calculation. The words *"three months immediately preceding the first day of employment in the new post"* meant that the last day of that reference period was the day before the Claimant's first day of employment in the new Band 6 post. The Tribunal's decision, that the reference period was the three previous, completed calendar months for which the Claimant was paid, was held to be in error. Further, it was intended under the relevant clause that the protected pay should reflect the basic salary and unsocial hours worked within the preceding three calendar months, that is those sums that the Claimant had actually earned during that period.

The appeal was therefore allowed.

The Respondent's cross appeal, that the judge erred in holding that these payments were "wages" under s.27(1) ERA, was dismissed. The argument that they were exempt under s.27(2) as amounting to 'compensation for loss of office' failed. The payments made to the Claimant pursuant to the pay protection policy were held to be payments referable to her obligation to render her services under her contract of employment.

Note

The Claimant applied for a review of the judgment in this appeal, after it was originally handed down, in order to make it clear that the Claimant succeeded on both grounds of appeal and that the two grounds of appeal were not being advanced as alternatives. The Respondents consenting to that course, the application was granted and the relevant passages in this judgment have therefore been varied to reflect that position.

THE HONOURABLE MRS JUSTICE COX

1. This is an appeal by the Claimant, Linda Webber, against a judgment of the Bristol Employment Tribunal (the employment judge sitting alone), promulgated with reasons on 15 July 2011. The short point in issue is the correct construction of the Claimant's contract of employment. She submits that the employment judge erred in his conclusion as to the meaning of Clause 3.5 of the Respondent's 'Protection of Pay on Organisation Change' policy, and in dismissing her claim of unlawful deduction from wages.

2. The Respondent cross-appeals on the basis (1) that the employment judge erred in finding that he had jurisdiction to determine a claim for breach of contract; and (2) that the sums paid by way of pay protection amount to compensation for loss of office and are therefore exempt from the definition of 'wages' in s.27(1) of the **Employment Rights Act 1996**. There was therefore no jurisdiction to determine the claim for unlawful deductions.

The relevant facts

3. The Claimant was employed by the Respondent as a Band 7 Clinical Team Leader. Her terms and conditions of employment, effective from 1 October 2004 onwards, provided in respect of remuneration:

> **"28.1 …You will be paid monthly in arrears 1/12th of the annual salary less tax and national insurance contributions and this will be made by bank credit transfer on the 28th of the month or, where the 28th falls on a weekend or bank holiday, the nearest previous working day."**

4. Following a re-organisation in 2010, the Claimant was offered an alternative Band 6 role, which she accepted. She was therefore redeployed, with effect from 22 November 2010, to a Band 6 position, attracting a lower salary.

5. The Respondent has in place a Pay Protection Policy, which provides that in such circumstances qualifying employees will stay on their same, higher rate of pay for a particular period. The relevant clause of this policy, which it was agreed constituted a term of the Claimant's contract of employment, was Clause 3.5, providing as follows:

> **"3.5 Basic salary for the purposes of 3.1 to 3.4 means basic pay and any enhancements payable for working unsocial hours. The basis salary to be protected will be calculated by taking a monthly average of the payments eligible for protection earned in the three months immediately preceding the first day of employment in the new post."**

6. In the letter sent to the Claimant offering appointment to the Band 6 role, the period of protected pay was to run for three years commencing on 15 January 2011.

7. There is no dispute that the first day of the Claimant's employment in the new post was 22 November 2010. In December 2010 the Claimant raised a grievance as to the method of calculation proposed under Clause 3.5 and the dispute led to the proceedings before the Employment Tribunal.

8. As the employment judge found, the Respondent based the calculation on the payments actually made to the Claimant for the months of August, September and October 2012, namely the three completed calendar months prior to 22 November, the date on which the Claimant's redeployment commenced. The Claimant argued that, pursuant to Clause 3.5, the calculation should have adopted her earnings for the three calendar months immediately preceding 22 November 2010. If the Claimant's contentions were correct, then for each of the three years of protected pay, she would be entitled to additional salary, said to amount to some £3,630, although the precise sums to which she would be entitled are not entirely clear from the papers before me.

9. Before the Tribunal the Respondent submitted (a) that the manner in which the policy had been applied in the Claimant's case was consistent with the approach taken in the cases of the other members of staff who had been redeployed; and (b) that the recognised Trade Unions had endorsed this approach. The employment judge did not find these submissions helpful, given that this was a dispute as to contractual interpretation. He also found that the Claimant had registered her complaint at an early stage, rejecting the Respondent's further submission that she had waived any breach of her contractual entitlement by continuing to work under the new arrangements.

The Tribunal's decision

10. The employment judge said as follows at paragraph 15 of his reasons:

> **"15. The Tribunal's jurisdiction to hear the breach of contract dispute was challenged. Specifically it was contended that the payments in issue did not comprise 'wages' for the purposes of Part II of the 1996 Act."**

11. He then set out his conclusions, being satisfied (at paragraph 16) that the claim fell **"…within the jurisdiction of the Tribunal both as a matter of contract and under the provisions of Part II of the 1996 Act: unauthorised deduction from wages."** On the main issue his conclusions appear from paragraphs 18-20, as follows:

> **"18. The essential issue in this case is one of contractual interpretation of paragraph 3.5 of the Policy. The Tribunal concludes that the interpretation properly to be given to this provision is that the average pay, for pay protection purposes, is to be founded upon the 'payments' earned, that is to say included in the monthly pay statement, for the three completed months immediately preceding the date from which the redeployment became effective.**
>
> **19. This interpretation reflects the manner in which payments were made as provided for in the terms and conditions of service and as operated in practice. The natural meaning to be attached to the material provision was that the average monthly earnings for the purposes of the calculation would be derived from the payments made in the three months preceding. It is implicit that monthly average was to be derived from completed calendar months rather than portions of a month.**
>
> **20. In the circumstances the complaint is dismissed."**

The appeal

12. It is agreed that the Claimant's contract was to be construed according to the common intention of the parties, assessed objectively, as at the time the contract was made.

13. On behalf of the Claimant, Mr Roberts raises two grounds of appeal, relating (1) to the correct reference period over which an average salary should be taken; and (2), further or in the alternative, to the sums to be averaged.

14. His first submission is that the judge erred in concluding that the phrase, "three months immediately preceding", was to be read as "three completed months immediately preceding"; and in concluding that this interpretation reflected the "manner in which payments were made", namely towards the end of each month.

15. He submits that the parties' intention as to the date on which salary was to be paid was irrelevant when considering what their common intention was in relation to calculation of the reference period for averaging pay protection. The words "*three months immediately preceding the first day of employment in the new post*" can mean only that the last day of the reference period was the 21 November and that the first day was the 21 August. Further, the only rationale given for the judge's conclusion was that his construction is consistent with how payments were made. In failing adequately to explain his conclusion his reasoning was not "**Meek**" compliant.

16. Further or alternatively, Mr Roberts submits that if the judge was correct in concluding that the reference period was the completed months of August, September and October, then he erred in concluding that the sums to be averaged were to be derived from the payments made to the Claimant in the three preceding months. The sums to be averaged are those payments

earned during the reference period. This can only mean the sums which the Claimant earned during the reference period, in respect of which she would subsequently be entitled to payment.

17. Ms Bone, for the Respondent, submits that the employment judge was correct to find as he did, for the reasons he gave, which were sufficiently clear and "**Meek**" compliant in the circumstances. In particular she submits that the judge was correct to have regard to other terms of the contract relating to how payment was made, and to the broad context in which the pay protection policy was applied. The Claimant's construction amounts to a distortion of the clear wording of the clause. Ms Bone repeated, in support of her submissions, the points made by the Respondent below as to the understanding of other employees and of the trade unions as to how clause 3.5 operated, which are said to be consistent with their case and with the finding of the employment judge.

18. In my judgment Mr Roberts' first submission is clearly correct. The employment judge had to determine the correct reference period of earnings for the purposes of the pay protection policy. The natural meaning of the words *"three months immediately preceding the first day of employment in the new post"* is that the last day of that reference period was the 21 November, the day before the Claimant's first day of employment in the new Band 6 post. The dates when payments were made to the Claimant under the contract were, in my view, irrelevant in determining that reference period. I reject Ms Bone's submission that the words in italics, quoted above, can only mean three completed months for each of which there is a pay slip.

19. The approach to construction adopted by the employment judge, that three months must mean three completed calendar months, seems to me to ignore the presence of the words *"immediately"* and *"first day"*. It was not in dispute that the length of a month was a calendar, as opposed to a lunar month. The question to be determined, however, was when each calendar

month should begin and end. The judge apparently concluded that each month should begin on the first day of that calendar month. I accept Mr Roberts' submission that there is nothing in Clause 3.5 or in any of the relevant background circumstances to support such a conclusion. I consider that the judge was in error in this respect.

20. Mr Roberts derives some additional support for his primary case from the long-standing 'corresponding date rule' and the decision of the House of Lords in **Dodds v Walker** [1981] 1 WLR 1027. The case concerned s.29(3) of the **Landlord and Tenant Act 1954**, providing that no application for a new tenancy under s.24(1) shall be entertained unless it is made "…not less than two nor more than four months after the giving of the landlord's notice under section 25…." The landlord gave notice to terminate the tenancy of business premises on 30 September 1978. The tenant applied for a new tenancy on 31 January 1979. He was held to have applied out of time.

21. The House of Lords dismissed his appeal. In construing s.29(3) the corresponding date rule applied, so that in calculating the period which had elapsed after the giving of the landlord's notice and excluding that day, the relevant period was the specified number of months thereafter, which ended on the corresponding day of the appropriate subsequent month. The tenant had therefore made his application out of time. Lord Diplock described it as "well established" that, when the relevant period is a month or specified number of months after the giving of a notice, the general rule is that the period ends upon the corresponding date in the appropriate subsequent month. He referred to the fact that the 1954 Act,

> **"…was passed at a time when the corresponding date rule had been recognised for more than a century as applicable in reckoning periods of a month after the occurrence of a specified event."**

Indeed, it appears to have been common ground in that case that ordinarily the calculation of a period of a calendar month or calendar months ends upon the relevant 'corresponding date.'

22. While this case concerned the interpretation of a statute, Lewison on the Interpretation of Contracts (5th edition) observes at paragraph 15.04, when referring to the rule, that

"…there is no difference in principle between a statute and a contract in this respect."

23. Ms Bone objects to Mr Roberts referring to the **Dodds** case, submitting that he is raising a new point not taken below. I accept his submission however, that he is not advancing a new point. While it is correct that **Dodds w**as not before the employment judge, the point being taken below as to the meaning of the phrase *"three months immediately before"* and as to the correct construction of the contract is exactly the same as that being advanced here, with the assistance of additional legal authority advanced in support of the construction for which the Claimant contends. It is a pure point of law, no further factual enquiry is required and the Respondent has been able to respond to it effectively. Mr Roberts does not contend that it is a rule of law which was binding upon the Tribunal. Rather, he advances it as a method of calculation which should apply, unless the circumstances indicate that it should not. There is, he submits, no basis for suggesting that it should not apply to the relevant calculation in this case.

24. Ms Bone submits that the corresponding date rule does not apply in the present case, which is concerned not with the situation where a contract provides for the performance of an act within a certain number of months, but with the case where the contract provides for pay to be assessed over a period of months. The rule does not apply, she submits, where the question to be determined is how a past period of time is to be calculated.

25. I do not accept this submission. The factual difference she identifies cannot, in my view, affect the correct approach to the calculation of the reference period. Nor is there any valid reason shown for departing from the approach established by the rule in this case. Indeed, it has been referred to and adopted by the EAT very recently in **Wang v University of Keele** [2011] ICR 1251, where Judge Hand QC was dealing with the effective date of termination of the claimant's contract of employment. At paragraph 38 he held, so far as is material,

> **"…(d) in computing any period within which something must be done or by which something is to take effect a start date must be identified;..**
>
> **(j) where a period is counted in months, in the absence of further definition, the application of the Interpretation Act 1978 will mean that these are calendar months;**
>
> **(k) the corresponding date rule is a method of computing calendar months and whether it is characterised as a rule of law or a rule of practice (or, for that matter, a rule of thumb) it is enough of a rule of law to apply unless the contrary is indicated by the circumstances."**

26. I agree with those observations and, in my judgment, there is nothing to indicate to the contrary in the circumstances of this case. For these reasons, I consider that the judge erred in concluding as he did. Clause 3.5 is unambiguous in its terms and Mr Roberts' primary submission succeeds. It is unnecessary to go on to consider the additional '**Meek**' challenge in the circumstances. In my judgment therefore the protected salary is to be calculated by taking a monthly average of the payments earned by the Claimant between 21 August and 21 November.

27. I also accept Mr Roberts' second submission. In my view the Tribunal erred in concluding that the sums to be averaged were to be "derived from the payments made in the three months preceding." In so concluding the judge appears to have focussed entirely on the word "payments", without having regard to the words "payments….earned" during the reference period, the word "earned" being the essential word in Clause 3.5. Alternatively, he appears to have held that the word "earned" meant "paid". In effect the judge found that the

reference period ran from 1 August to 31 October. As Mr Roberts points out, payment was made to the Claimant on the 28th day of each month. Thus, the payment made to her on 28 October would not have reflected what the Claimant actually earned in the completed calendar month of October. It was intended under Clause 3.5 that the protected pay should reflect the basic salary and unsocial hours worked within the preceding three calendar months, that is those sums that the Claimant had actually earned during that period.

28. For these reasons I accept Mr Roberts' submissions as to the correct meaning of this clause. The Claimant therefore succeeds on both grounds of appeal.

The cross-appeal

29. I can take the first point shortly. It is common ground between the parties that the Tribunal did not have jurisdiction to determine a free-standing claim for breach of contract because the Claimant was still employed at the time she submitted her ET1. It is clear from the documents before me that the Claimant, although initially advancing such a claim, confirmed in correspondence that no such claim would be pursued and that the claim for breach of contract was withdrawn.

30. It is not entirely clear whether the employment judge was aware of this correspondence when giving his reasoned judgment. Notwithstanding some infelicitous wording at paragraph 16, it appears to me likely that he was, since the formal, one page Judgment records only the dismissal of the unlawful deductions claim and makes no reference to any stand alone claim for breach of contract. To the extent that he was finding, at paragraph 16, that there was jurisdiction to determine such a claim the judge was plainly in error.

31. In my view however, reading the judgment as a whole, the employment judge was, throughout, interpreting this Claimant's contract solely for the purposes of her unlawful deductions claim, and was not determining that there was a free-standing breach of contract. That clarification is sufficient to deal with this point, since the parties are agreed that there was no jurisdiction to determine such a claim and the Claimant had already withdrawn it. That is therefore the end of the matter.

32. I turn, then, to the main point raised in the cross-appeal. Ms Bone's complaint is that, having noted at paragraph 15 that the Respondent was contending that the payments in issue were not 'wages' for the purposes of Part II of the 1996 Act, the employment judge failed to reach a finding on this issue. It is a question of law whether or not those payments fall within the exceptions set out in s.27(2) of the Act. The EAT is invited to substitute its own decision that they do.

33. Ms Bone submits that if the Tribunal had properly directed itself to this point, it would have found that the relevant payments did not fall within the definition of 'wages' because they were properly to be regarded as compensation for loss of the Claimant's Band 7 office, when she was redeployed to a Band 6 role. The payments were made pursuant to a pay protection policy, providing employees with a period of pay protection if their basic salary decreased as a result of organisational change. Their purpose was to promote good industrial relations and to incentivise continuity of employment. Viewed in this way, the employee's entitlement to those payments is related to the loss of a higher-paid role and so falls within the exemption under s.27(2), as compensation for loss of office.

34. She submits that, at the end of the pay protection period, the Claimant would no longer be paid at the higher rate and would suffer a reduction in pay despite all her other terms and

conditions remaining the same. The enhancement to her pay provided for by the policy is paid without reference to the Claimant's performance of her role. It is paid because of the loss of her role. Acknowledging the absence of authority on compensation for loss of office, Ms Bone seeks to rely on **Delaney v Staples** [1992] 1 AC 687, and submits that a distinction is to be drawn between payments relating to the termination of employment and payments relating to the rendering of services during the employment. In this case the services which the Claimant renders after the pay protection period expires will be the same as those she renders during it. The pay protection sums are not paid by reference to the services she renders during the period when it is paid.

35. The relevant statutory provisions at s.27 are, so far as material, as follows:

> **"(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including – (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise …..but excluding any payments within subsection (2).**
>
> **(2) Those payments are –(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudices to the application of section 13 to any deduction made from the worker's wages in respect of any such advance), (b) any payment in respect of expenses incurred by the worker in carrying out his employment, (c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office, (d) any payment referable to the worker's redundancy, and (e) any payment to the worker otherwise than in his capacity as a worker."**

36. I have considered Ms Bone's submissions carefully, but I cannot accept them. In my judgment these payments cannot be said to constitute compensation for loss of office within the meaning of section 27(2).

37. Counsel on both sides referred to **Revenue and Customs Commissioners v Stringer and Others** [2009] 4 All ER 1205 HoL and specifically paragraph 24, where Lord Roger set out Lord Browne-Wilkinson's observations in **Delaney**. Referring to the need to approach the definition of 'wages' in section 27 bearing in mind the "normal meaning" of that word, he said this:

> **"I agree with the Court of Appeal that the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the word "wages".**

38. That passage seems to me to provide the complete answer to this dispute because there is no doubt, in my view, that the payments made to the Claimant pursuant to the pay protection policy are payments referable to her obligation to render her services under her contract of employment. They are paid to her as her wages for the job she is doing. I prefer Mr Roberts' submission in this respect. The Respondent took the decision to protect the pay of those employees who were redeployed, following reorganisation, in this particular way, their entitlement to such payments under the policy forming a term of their contract of employment, as was conceded. The Respondent's wish to preserve their existing staff base was an important aspect of this arrangement and the payments are clearly referable to their continued employment.

39. As Mr Roberts points out, had the Claimant not accepted the Band 6 role offered to her, she would not receive these payments. Ms Bone submits that, in those circumstances, she would have received alternative compensation in the form of a notice payment and, possibly, a redundancy payment. However, the Claimant agreed to carry on being employed and, under Clause 3.5, it is a term of her contract of employment that she is entitled to be paid the same salary for a defined period. Her salary is fixed by reference to the salary earned in the reference period.

40. For these reasons, these payments do not fall within the exemption for compensation for loss of office in section 27(2). In my judgment they are clearly "wages" within section 27(1). The cross-appeal is therefore dismissed.

41. The Claimant's appeal is therefore allowed and the Respondent's cross-appeal is dismissed. In the circumstances the EAT has all the necessary factual findings to substitute its own decision that the claim of unlawful deduction of wages succeeds. The case will therefore be remitted to a freshly constituted Employment Tribunal for a remedies hearing, unless the parties are able to agree the sums to which the Claimant is entitled.

Addendum

42. The Claimant applied for a review of the judgment in this appeal, after it was originally handed down, in order to make it clear that the Claimant succeeded on both grounds of appeal and that the two grounds of appeal were not being advanced as alternatives. The Respondents consenting to that course, the application was granted and the relevant passages in this judgment have therefore been varied to reflect that position.