Appeal No. UKEAT/0520/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 May 2013
Judgment handed down on 17 May 2013

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

MR A J ENGEL — APPELLANT

THE JOINT COMMITTEE FOR PARKING & TRAFFIC REGULATION OUTSIDE LONDON (P.A.T.R.O.L) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADAM SOLOMON (of Counsel) and CHARLOTTE DAVIES (of Counsel) Instructed by: Messrs John Collis Solicitors Curzon House 64 Clifton Street London EC2A 4HB
For the Respondent	MR PAUL GILROY (of Counsel) and MR CHRISTOPHER TAFT (of Counsel) Instructed by: Nabarros Solicitors Lacon House 84 Theobald's Road London WC1X 8RW

SUMMARY

VICTIMISATION DISCRIMINATION

Whistleblowing

Detriment

Whether or not a decision by the Chief Adjudicator of the Traffic Parking Tribunal not to allocate cases to a fee paid Parking Adjudicator could amount to a detriment for the purpose s47B of the **Employment Rights Act 1996** – decision: it cannot because it was made by her in the execution of judicial functions in her capacity as a judicial office holder; accordingly, it was covered by judicial immunity.

THE HONOURABLE MR JUSTICE MITTING

1. From 31 May 2000 until his seventieth birthday on 10 May 2013, the Appellant was a parking adjudicator authorised to hear appeals against decisions of local enforcement authorities to uphold the imposition of penalty charges in respect of certain road traffic contraventions. His appointment was originally made by the Joint Committee for Parking and Traffic Regulation outside London (a consortium of local authorities responsible for traffic enforcement in their area) under regulations made under section 73 of the **Road Traffic Act 1991** and later renewed under section 81 of the **Traffic Management Act 2004**. It was last renewed on 21 May 2010 and ran from then until his seventieth birthday.

2. Regulation 17(5) of the **Civil Enforcement of Parking Contraventions (England) General Regulations 2007** SI.2007/3483, made under section 81 of the 2004 Act, provides that adjudicators who were appointed under section 73 of the 1991 Act and held office immediately before the coming into force of Regulation 17 shall be treated as having been appointed on the same terms on which they then held office. The Appellant's terms and conditions of appointment contained the following provisions:

i) He could be removed from office only for misconduct or on the ground that he was unfit to discharge his functions.

ii) He could be called upon to sit and undertake other prescribed duties "as the need arises". The frequency of sittings would depend on the workload of the National Parking Adjudication Service and on his commitments.

iii) He would be paid a fee of 1/220 of 90% of the salary payable to an office holder in Judicial Appointments Group 7 per day.

His terms and conditions of appointment also contained provision for non-renewal on five grounds. Subject to Regulation 17(5) it was for the "relevant enforcement authorities" to decide the terms upon which an adjudicator was to be appointed: Regulation 17(1). Under Regulation 17(3) any decision by those authorities not to reappoint or to remove an adjudicator from office could not have effect without the consent of the Lord Chancellor and of the Lord Chief Justice (or a judicial office holder nominated by him).

3. For the purpose of determining this appeal, it is not necessary to set out the factual background in any detail. Parking adjudicators determine appeals by one of two means: at a personal hearing at which an appellant and the relevant authority can make oral representations to the adjudicator; or after considering written representations held in a computer file – known as "postal cases". The last personal hearing conducted by the Appellant was on 16 June 2011. On a date which I do not know, Caroline Sheppard, Chief Adjudicator of the Traffic Penalty Tribunal, ceased to allocate personal hearings to the Appellant, apparently because of concerns which she had about his conduct of two such hearings earlier in 2011. On 20 August 2011 the Appellant made a protected disclosure to the Joint Committee in which he complained about the actions of the Chief Adjudicator. The Senior President of Tribunals then asked Judge Sycamore, Chamber President (Health, Education and Social Care Chamber) First Tier Tribunal to investigate his complaints. In a detailed written report of 16 January 2012, he concluded that the Chief Adjudicator's concerns about the Appellant's conduct of the relevant personal hearings were justified. On 30 January 2012, the Chief Adjudicator asked the Appellant not to decide any further postal cases pending a meeting between them. Because he

did not receive that message when sent, he continued to do so until 8 February 2012, when he received an email from her which concluded,

> **"I requested you not to decide anymore postals until we had met but I note you did some last weekend. In the circumstances I have asked for the files to be removed from your tray until we have met.**
>
> **I look forward to seeing you."**

In the event, for reasons which it is unnecessary for me to set out, no meeting took place. On 17 March 2012, the Appellant filed a complaint at the Birmingham Employment Tribunal alleging that he had been subjected to a detriment under section 47B of the **Employment Rights Act 1996** as a result of the protected disclosure which he made to the Joint Committee on 11 August 2011. He has not been allocated any personal or postal appeals since.

4. The Appellant does not accept that the Chief Adjudicator's concerns were well-founded or Judge Sycamore's conclusion that they were. I have reached no conclusion about these matters and my decision on this appeal should not be taken to indicate that I have done so.

5. The Joint Committee applied under rule 18(7)(b) of the **Employment Tribunals Rules of Procedure** to strike out the claim on the basis that it had no reasonable prospect of success. Employment Judge Kelly conducted a pre-hearing review on 8, 15 and 18 June 2012, at which she considered written evidence and other materials and heard submissions from the Appellant in person and from counsel for the Joint Committee. In a reserved judgment sent to the parties on 29 June 2012, she decided that the claim had no reasonable prospect of success and struck it out. She decided, in favour of the Appellant, that it was at least arguable that he was a "worker" as defined by section 230(3)(b) of the 1996 Act. She struck out the claim because she was satisfied that the Joint Committee was not vicariously liable for the challenged decisions of

the Chief Adjudicator. She also held that, in any event, the decisions of the Chief Adjudicator not to allocate personal and postal cases to the Appellant were taken in the exercise of judicial functions, in respect of which she was entitled to judicial immunity and for which the Joint Committee could not be vicariously responsible.

6. In their written submissions, the Joint Committee contended that the finding that the Appellant was at least arguably a "worker" within the statutory definition was wrong and should be reversed. At the start of his oral submissions, Mr Gilroy QC for the Joint Committee abandoned that ground of challenge. He was right to do so. Section 230(3) of the 1996 Act provides,

> **"In this Act "worker"…means an individual who has entered into or works under…-**
>
> **(a) a contract of employment, or**
>
> **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual…"**

The written submissions contended that the Appellant did not perform his functions pursuant to a contract. This submission is untenable. There are three generally accepted definitions of a contract, two at common law and one in the law of the EU. The two common law definitions are: a promise or set of promises which the law will enforce; or an agreement giving rise to obligations which are enforced or recognised by law: *Chitty on Contracts* 31st Edition 1 – 016. The EU definition, taken from the proposed regulation on a Common European Sales Law, is an agreement intended to give rise to obligations or other legal effects: ibid 1 – 022. Under any of the three definitions, the Appellant performed work as an adjudicator under a contract: by his acceptance of an appointment under the terms and conditions referred to, he promised to sit as an adjudicator, dependent on the workload of the tribunal and on his commitments, in return for

a fee; his appointment gave rise to obligations which would be recognised and, in the case of the payment of his fee, enforced, by law; it also gave rise to like obligations and legal effects. Further, if the Joint Committee's contention had been correct, it would have required the same words in the same section of a statute governing the rights of workers to have a different meaning in a case in which EU law had no part to play from one in which it did. It is now settled law that a fee-paid judicial office holder is a "worker" in the latter context: **O'Brien v. Ministry of Justice** [2013] UKSC 6 paragraph 42. In an area of law in which it is now accepted that EU and domestic law cannot readily be disentangled, the proposition that the same words mean different things depending upon whether or not they can be disentangled, is unlikely to be correct. For those reasons, even had the concession not been made, I would have gone further than the Employment Tribunal Judge and held that the Appellant was a "worker" for the purpose of Part IVA of the 1996 Act (the protected disclosures provisions).

7. There is some common ground on the remaining two, determinative, issues. It is common ground that the Chief Adjudicator is a judicial office holder and that, in the discharge of her judicial functions, she is entitled to judicial immunity; and that, in respect of her discharge of those functions, the Joint Committee could not have vicarious responsibility. It is also common ground that the Chief Adjudicator, in addition to being a judicial office holder discharging judicial functions, was an employee of the Joint Committee and did perform administrative or "ministerial" functions. Employment Judge Kelly did not submit her terms of appointment to detailed analysis. She simply concluded that the decision not to allocate personal or postal cases to the Appellant was made in the performance of her duties as a judicial office holder. To enable me to determine this appeal, I consider it necessary to analyse her terms of appointment in greater detail. With one exception, the material relied on is the same as that before the Employment Tribunal.

8. Regulation 17 of the 2007 Regulations does not expressly authorise the appointment of a Chief Adjudicator; but it is implicit in the general power of appointment given by Regulation 17(1) to appoint adjudicators on such terms as the relevant enforcement authorities may decide that they may distinguish between the terms of appointment of different adjudicators. Accordingly, the Joint Committee was entitled to appoint a Chief Adjudicator with responsibilities additional to those undertaken by other adjudicators, at a higher salary and on a full-time basis.

9. Two documents presented to the Employment Tribunal set out the responsibilities of the Chief Adjudicator. The first was a "job description", issued by the lead authority of the Joint Committee, then Manchester City Council. It stated that she reported to Manchester City Council Chief Executive "for employment purposes" and to the Joint Committee "in the performance of relevant judicial matters (as appropriate)". It stated that she was "responsible for parking adjudicators". Her responsibilities were set out in two sections. The first was headed "Main purpose of the job" and stated,

> **"The national parking adjudication service is responsible for making arrangements for a one-person statutory tribunal determining appeals from vehicle owners in respect of parking penalties imposed by local authorities. This post is head of the judicial functions of the service and has specific responsibility for:**
>
> **1. the determination of appeals and statutory declarations in accordance with the Road Traffic Act 1991.**
>
> **2. for ensuring compliance with the Adjudicator's Procedural Regulations.**
>
> **3. to allocate appeal cases to other parking adjudicators and advise them on the more complex appeal cases".**

The second section set out her "Main tasks". They were sub-divided into "Managing service direction" and "Managing service provision". The language used to describe these tasks is tortuous. Translated and simplified, they are: to help set up and manage the adjudication service; to develop training programmes for adjudicators; to determine where they sit and to

appraise them; to deal with complaints against them; to advise the Joint Committee and to represent it in dealing with other agencies.

10. In addition, by an undated written scheme of delegation, the Joint Committee delegated six significant functions to the Chief Adjudicator: appointing adjudicators (with the consent of the Lord Chancellor) and extending their appointments; determining the terms and conditions of such appointments; determining where adjudicators shall sit; defending legal proceedings brought against adjudicators; conducting media relations; and promotion of the Traffic Penalty Tribunal.

11. It is common ground and self-evident that the first two main purposes set out in the job description are judicial functions. The third has been the subject of debate. Mr Solomon, for the Appellant submits that the first of the two purposes set out in paragraph 3 ("to allocate appeal cases to other parking adjudicators") is not a judicial function. Mr Gilroy QC submits that it is. This is a critical issue in the appeal, which I deal with below. The second purpose ("to…advise them on the more complex appeal cases") is puzzling. The schedule to the **Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007** SI.2007/3482 contains conventional provisions for the presentation and determination of appeals by an adjudicator, including provision for the giving of evidence and the making of submissions at an oral hearing and the giving of reasons by the adjudicator for his decision. For an adjudicator to decide an appeal in a "complex" case, not on the basis of evidence and representations which he had heard at an oral hearing, but on the basis of advice which he had received from a person who had not heard the appeal would cause the decision to be open to challenge by judicial review. If, exceptionally, advice is permissible in the context of this statutory scheme, the advice would clearly relate to the determination of an appeal by an individual against a civil penalty and so would be given in the exercise of a judicial function by

the Chief Adjudicator. Accordingly, all of the main purposes, other than the allocation of appeal cases to other adjudicators can only be achieved in the exercise of judicial functions. This suggests that Manchester City Council, on behalf of the Joint Committee, had in mind the distinction between her judicial and other functions. Her non-judicial functions are set out under the heading "Main tasks" and in the Scheme of Delegation.

12. It is common ground that in appointing and reappointing an adjudicator, the Chief Adjudicator would not be exercising a judicial function. It is also common ground that a decision by the Joint Committee not to reappoint a person as an adjudicator or to remove him from office under Regulation 17(3) of the 2007 General Regulations would not be made in the exercise of judicial functions, by whomsoever it was made. The Scheme of Delegation does not expressly delegate either function to the Chief Adjudicator. There was no evidence before the Employment Tribunal on this issue, but I have been told by Mr Gilroy that these functions were delegated by the lead authority's Chief Executive to the Chief Adjudicator. Mr Solomon had no knowledge of this. If anything significant turned upon it, I would, in default of agreement by the parties, have required evidence about it to be produced under Rule 27 of the **Employment Appeal Tribunal Rules 1993**. Mr Gilroy's concession that a decision not to reappoint or to remove an adjudicator made by the Chief Adjudicator would not be in the exercise of judicial functions makes that course unnecessary.

13. Significant omissions from the statutory and non-statutory scheme are of any disciplinary provision in relation to adjudicators other than removal or non-reappointment and of any procedural disciplinary rules. Again, if the omission had been significant, I would have required agreement or further evidence upon it; but, again, a concession by Mr Gilroy has removed the need for that. He accepts that the taking of disciplinary steps against an adjudicator, other than a decision not to allocate personal or postal cases or both, by the Chief

Adjudicator would not be in the exercise of her judicial functions. I am satisfied that the concession is correctly made. Disciplinary proceedings have nothing to do with the resolution of disputes between parties to an appeal by an adjudicator. They concern only the position of the adjudicator.

14. No doubt because of the way each side's case was presented to her, Employment Judge Kelly treated two important questions separately: whether the Joint Committee was vicariously responsible for the acts of the Chief Adjudicator as an office holder; and whether her decision not to allocate cases to the Appellant was made in the discharge of judicial functions and so immune. On a proper analysis of the terms of appointment of the Chief Adjudicator, there could, on the facts, be no distinction between the two. If, as I am content to assume, the proposition upheld in **Stanbury v. Exeter Corporation** [1905] 2KB 838 remains good law, it establishes that a local authority is not vicariously liable for the negligent performance by an officer appointed by them of duties imposed upon him personally by statute. However, all three judges in a court presided over by Lord Alverstone CJ drew a clear distinction between such a case and one in which the performance of duties imposed on the local authority was delegated by them to the official. In that event, "the ordinary rule in cases of master and servant and the doctrine of respondent superior might apply", per Lord Alverstone CJ at 841. In this case, the power of appointment and reappointment of an adjudicator and, if Mr Gilroy's statement is correct, of removal and non-reappointment, the principal disciplinary powers expressly available to the Joint Committee, were delegated to the Chief Adjudicator. Further, if a power to take lesser or preparatory disciplinary measures existed, it must have been vested in the Joint Committee. Insofar as it was exercised by the Chief Adjudicator, she would have done so as their delegate. The Joint Committee had, however, no judicial function. That was conferred by section 81 of the 2004 Act, by Regulation 17 of the 2007 General Regulations and

by the obligation to determine appeals imposed by their terms of appointment, upon adjudicators, including the Chief Adjudicator.

15. If a decision to allocate or not to allocate an appeal to an adjudicator is a decision made in the exercise of judicial functions, judicial immunity will attach to it. It is, accordingly, necessary first to determine whether such a decision is, in principle made in the exercise of judicial functions. Long established conventional wisdom is that it is. In the case of listing decisions made in courts in which judges appointed by the Crown sit, the Ministry of Justice and its predecessors have always maintained that section 2(5) of the **Crown Proceedings Act 1947** provides a water-tight defence to a claim brought by an aggrieved litigant as a result of listing errors: "no proceedings shall lie against the Crown…in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibility of a judicial nature vested in him". As far as I know, this proposition has never been successfully challenged in litigation. The reason for it is obvious. Decisions about listing and allocation can have a significant impact upon the judicial determination of a dispute: for example, a decision as to when a case may be heard and as to the time available for it to be heard my affect the evidence upon which the parties may be able to rely. The knowledge and experience of a judge or group of judges in particular classes of case may require such cases to be allocated to him or to them for their just and efficient determination. Many listing and allocation decisions are made by judges of all kinds. It would be surprising if such decisions made by judges attract immunity, as clearly they must, but not if made by a listing officer. Such decisions are not of a purely formal or administrative character and so are not authorised to be performed by a court officer under CPR 2.5(1). I have not been referred to and have been unable to find any statutory authority conferring the power to list and allocate cases upon a court officer. The legal theory behind the generally accepted proposition must, therefore, be

that listing and allocation remain the prerogative of judges, even though, in practice, the task is performed by listing officers. In the language of section 2(5) of the 1947 Act, it must be because the responsibility is "vested" in them by the longstanding tacit decision of the judges of the court in which they work.

16. Mr Solomon submits that that analysis does not, or can no longer, stand against the observations of Sir Robert Carswell LCJ in **Perceval-Price v. Department of Economic Development** [2000] IRLR 380, approved by Lord Walker, delivering the judgment of the Supreme Court in **O'Brien v. Ministry of Justice** [2010] UKSC 34 at paragraph 26:

> **"All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the President of the Industrial Tribunals or the Court Service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes some of the characteristics of employment".**

Sir Robert Carswell did not state in that passage that the listing of cases or the allocation of work to judges was not a judicial function. All he did was to point out, unlike the self-employed, judges were expected to work during defined times and periods and needed some organisation of their sittings. Nor was the Supreme Court in either of the two **O'Brien** judgments concerned to decide whether or not listing and allocation were judicial decisions. I do not accept Mr Solomon's submission that those observations disturbed the conventional and correct categorisation of listing and allocation decisions.

17. That conclusion is not, however, enough to dispose of this appeal. Mr Solomon submits, as did the Appellant in the Employment Tribunal that the decision not to allocate him any personal or postal cases was not a listing or allocation decision, but a decision to suspend him from work. I accept that it had that effect: if he was not allocated any cases to determine,

he could not work and so could earn no fees. In her witness statement, submitted as part of the Joint Committee's evidence to the Employment Tribunal, the Chief Adjudicator dealt with this issue under the heading "(The appellant's) judicial performance and misconduct". She set out the reasons why she considered that a meeting between her and the Appellant was required to address what she described as his "judicial performance and misconduct"; and said that "these matters have to be satisfactorily resolved before (the appellant) undertakes more work". Because Employment Judge Kelly treated the issue as one of principle, she did not expressly refer to this evidence in her judgment. Mr Solomon relied upon it and, because it is relevant to the issues which I have to decide, I will do so too. What it shows is that the Chief Adjudicator made the decision not to allocate any further cases to the Appellant in the context of addressing issues of "performance and misconduct". A possible interpretation of her words – not explored, because cross-examination was not permitted – is that the Chief Adjudicator took the decision in the context of disciplinary action which, for reasons explained above, was not undertaken in the exercise of judicial functions. A decision not to allocate cases to a judge, whether salaried or fee-paid, is sometimes taken pending consideration of a disciplinary complaint against him. In the case of a complaint which might call into question his suitability to remain in office or to continue to try cases of a particular class, the decision would normally be taken to maintain public confidence in the administration of justice and to avoid any litigant whose case was determined by that judge having cause to challenge his judgment on the ground that he had heard the case. Non-allocation would, in those circumstances, clearly be a decision taken in the exercise of judicial functions. If that was the Chief Adjudicator's purpose, judicial immunity applied to her decision.

18. Even if her decision was taken as a free-standing disciplinary measure and even if it was taken for the improper purpose alleged by the Appellant of subjecting him to a detriment

because of his protected disclosure, her decision would, in my judgment, still be covered by judicial immunity. The principle of immunity for the exercise of judicial functions is, ultimately, a policy decision, which must be upheld even in extreme circumstances, as Lord Denning MR explained in **Sirros v.Moore** [1974] 3 AER 776 at 781J – 782D

> **"Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action…..Of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden CJ in *Garnett v. Ferrand*:**
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> > **'This freedom from action and question at the suit of individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may free in thought and independent in judgment, as all who are to administer justice ought to be.'**
>
> **Those words apply not only to judges of the superior courts, but to judges of all ranks, high or low."**

19. Accordingly, for the reasons given, Employment Judge Kelly was entitled and right to find that the Chief Adjudicator's decision not to allocate further personal or postal cases to the Appellant was a decision taken by her in the exercise of judicial functions in her capacity as a judicial office holder. For that reason, it would not be open to an Employment Tribunal to determine that, in consequence, the Joint Committee subjected the Appellant to a detriment contrary to section 47B of the 1996 Act. This appeal is therefore dismissed.