Appeal No. UKEAT/0130/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 October 2017

Before

NAOMI ELLENBOGEN QC

(DEPUTY JUDGE OF THE HIGH COURT)

(SITTING ALONE)

MR P STRICKLAND — APPELLANT

KIER LIMITED & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MR PETER STRICKLAND (The Appellant in Person)
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

PRACTICE AND PROCEDURE - Case management

CONTRACT OF EMPLOYMENT

1. Where, for the purposes of his contractual claims, a Claimant contends that the proper law of a contract has the same result as would be the case under the law of England and Wales and the Respondent contends that it has a different result, it is for the Respondent both to plead and establish the result for which it contends in relation to each affected claim.

2. The Employment Tribunal erred in ordering that the Claimant pay half the cost of providing evidence of the position under Dubai law, alternatively that a firm of the Tribunal's choosing be instructed on a joint basis. The matter is remitted to the same Employment Tribunal for further directions in accordance with this Judgment.

NAOMI ELLENBOGEN QC (DEPUTY JUDGE OF THE HIGH COURT)

1. In this Judgment, I shall refer to the parties as they appeared before the Huntingdon Employment Tribunal. This is the Claimant's appeal from a case management Order made at a Preliminary Hearing, sent to the parties on 7 November 2016. As he did before the Tribunal, the Claimant represented himself before me. The Respondents have declined to attend or be represented at the hearing of this appeal and have stated that they do not intend to contest it.

2. By way of material background, in an earlier Judgment sent to the parties on 17 November 2014, the Tribunal had found, so far as material for present purposes, that the Claimant's contractual claims for wrongful dismissal, accrued unpaid holiday pay and accrued entitlement to UK flights and relocation costs could proceed and that the law to be applied in determining those claims was that of Dubai. That conclusion stood following a Reconsideration Judgment, sent to the parties on 13 May 2015, and the Claimant's unsuccessful appeal to this Tribunal.

3. On 12 August 2016, a case management discussion took place, listed to determine the future conduct of the contractual claims. The day before that hearing, the Respondents applied to the Tribunal to strike out the claims for wrongful dismissal and relocation costs, contending that the claim for wrongful dismissal could only be founded on a constructive dismissal as the Claimant had resigned. As - so the Respondents further contended - Dubai law does not have a concept of constructive dismissal, that claim had no real prospect of success and the claim for relocation costs was contingent upon it.

4. As appears from the Tribunal's case management discussion summary, in support of its contention as to Dubai law the Respondents relied upon advice from a firm of advocates and legal consultants in Dubai, Al Tamimi and Co. It was the Tribunal's stated view that that advice was somewhat limited in scope and was apparently contradicted by other advice seemingly given by the same firm. Accordingly, the Tribunal declined to hear the Respondents' strike-out application, giving directions intended to identify the ambit of any dispute as to the applicable provisions of Dubai law. So far as material, those directions required, first, that the Claimant provide amended Particulars of Claim identifying the provisions of Dubai law and, where applicable, within his contract on which he relied for each of his contractual claims, and, thereafter, that the Respondents amend their Grounds of Resistance to respond to those Particulars, setting out their position on the provisions of Dubai law on which the Claimant sought to rely. By 30 September 2016, the parties were to advise the Tribunal whether a dispute remained between them as to any provision of the law of Dubai and, if so, the nature of that dispute. A further case management hearing was listed for 27 October 2016.

5. By the time of that October hearing, the earlier Orders had not been progressed by the parties. The Tribunal recorded that the proceedings had then been extant for over three years and that, as the parties had been unable or unwilling to agree the legal position, it had adjourned the hearing to give them time to consult to determine whether they could agree a single law firm to be instructed jointly and to answer the single question as to whether or not the contractual claims could proceed under the law of Dubai. It was noted that the parties had agreed that the Dubai office of Herbert Smith Freehills should be instructed. At paragraph 6 of its case management discussion summary, the Tribunal recorded:

> **"6. The Claimant said that he was unsure of the cost of the referral and I advised that enquiries should be made of Herbert Smith Freehills as to the costs which they would charge for providing this short opinion and that if Mr Strickland no longer wished to instruct them**

on the basis of the costs they would charge then the Tribunal would select a single expert and the parties would have to jointly instruct that expert. …"

The Tribunal further noted that the case had drifted on for too long and that the issues between the parties were narrow.

6. Having set out those issues, the Tribunal proceeded to give directions to bring the matter to a final hearing. So far as material to this appeal, those directions required:

(i) (at paragraph 9) that Herbert Smith Freehills would be approached to advise on whether the Claimant is entitled to bring a claim under the law of Dubai for damages as a result of a fundamental breach of contract by his employer; in particular, for wrongful dismissal, unpaid holiday pay and accrued entitlement to UK flights and relocation costs. That advice was to be limited to whether any such claim is sustainable under the law of Dubai;

(ii) (at paragraph 10) that the costs of instructing Herbert Smith Freehills were to be borne jointly; and

(iii) (at paragraph 11) that Herbert Smith Freehills were to provide a quotation for the provision of such advice, not later than 11 November 2016. In the event that either party considered the cost to be excessive, an alternative firm would be identified by the Tribunal and the parties would instruct that firm on a joint basis, irrespective of the cost.

7. Further directions were given. Once the relevant legal advice had been provided, the parties were to identify any extant issues of law between them. The Claimant was then to set out the factual matters on which he relies as amounting to omissions constituting a fundamental breach of contract, to which the Respondents could reply. The final hearing was listed to take place in March 2017. Those case management Orders were sent to the parties on 7 November 2016 and are the subject of the appeal before me.

8. By Order dated 17 May 2017, following a Rule 3(10) Hearing, His Honour Judge Richardson allowed the appeal to proceed on limited grounds as set out at paragraphs 16 to 19, 35 to 36 and 42 of the Claimant's grounds of appeal. All other grounds of appeal were dismissed.

9. The grounds that were allowed to proceed were that the Tribunal had erred in law in requiring the Claimant to pay half the cost of instructing Herbert Smith Freehills (paragraph 10 of the Tribunal's Orders), and in its alternative Order that a different firm of the Tribunal's choosing would be instructed jointly, irrespective of the cost (paragraph 11 of the Tribunal's Orders). It is said that the burden of proof relating to foreign law rests on the party who relies upon it for his claim or defence. It is further said that the Tribunal has erred by not requesting the Respondents to evidence and detail the foreign law provisions on which they rely and the issues to which those provisions apply in their Grounds of Resistance. Accordingly, it is contended that the Claimant has not had the opportunity to understand the case against him. Finally, it is said that the absence of a pleaded case as to foreign law, coupled with an asserted oral indication on behalf of the Respondents that no evidence of that law will be called, should result in a finding that English law applies. In context, I take that to be an assertion that Dubai

law should be presumed to follow the law of England and Wales on the relevant issues in the absence of evidence to the contrary.

10. On Monday afternoon of this week, the Respondents' solicitors wrote to this Tribunal stating that the Respondents did not intend to contest the Claimant's appeal and enclosing a draft Consent Order, which they had asked the Claimant to sign. That Order provided that the appeal should be dismissed on the basis that the Respondents will pay the legal fees incurred in obtaining a letter of advice from Herbert Smith Freehills in accordance with paragraph 9 of the Tribunal's Order. The Claimant was given until midday yesterday to respond. He stated that the Respondents had missed the legal principles under consideration and wished the appeal to proceed. The Respondents' solicitors replied stating that the only point of appeal to be considered was the Order that the Claimant should pay 50% of the costs of obtaining specialist legal advice on Dubai law. Given that their clients were prepared to meet the whole of those costs, they submitted that there was no merit in proceeding with the hearing and stated that neither the Respondents nor their legal representatives would attend should that hearing take place. The parties were informed that the hearing would go ahead this morning.

11. As the appeal is no longer contested, I have considered the Claimant's chronology and skeleton argument and the further oral submissions that he has made this morning. His position is as set out in those grounds of appeal that were allowed to proceed, which I have summarised above. In support of that position, he relies on Rule 25 and related commentary in *Dicey, Morris & Collins' Conflict of Laws* and on certain passages in *Fentiman's Foreign Law in English Courts.*

12. The Claimant says, correctly, that it was the Respondents who first contended that foreign law applied, later identifying that law to be the law of Dubai. Their contention was first raised, generically, at paragraph 44 of the response form, lodged in November 2013. Subsequently, at paragraph 2 of a replacement skeleton argument dated 14 October 2014, the Respondents asserted, *'…the applicable law for his contract claims is that of Dubai and not England and Wales'*.

13. Relying on a passage at page 62 of *Fentiman*, the Claimant asserts that, in contending that his claims should either be struck out or should fail on their merits, the Respondents are contending that Dubai law contains a particular rule and/or is to a certain effect. With reference to *Dicey, Morris and Collins*, at paragraph 9-025, he further asserts that the burden of proving foreign law lies on the party who bases his claim or defence upon it. He says that it is therefore for the Respondents to identify the rules and/or effect on which they rely, in order that he may understand the case that he has to meet, and then to establish their position, if that case is disputed. It is also the Claimant's position that there is more than one system of law in Dubai, making it necessary for the Respondents to identify and establish the particular system of law on which they rely. In support of those contentions, the Claimant relies upon a dictum of Waller LJ, at paragraph 16 of a judgment refusing permission to appeal to the Court of Appeal, in **Podgorica v Bishopscourt (BB & Co) Ltd (In Liquidation)** [2002] EWCA Civ 1468, as follows:

> **"16. I ought to add that at the commencement of his submissions Mr Rainey suggested that the claimants were in difficulty because in a case of this sort, once it is accepted for the purpose of the summary judgment application that Yugoslav law is the proper law, then it was incumbent on the claimants to, in effect, swear that by Yugoslav law the result was the same as by English law. In my view that is not a burden imposed on a claimant in this situation. There is no reason why a claimant on a summary judgment application should not be in the same position as a claimant at a trial. A claimant is entitled to plead his case on the basis that foreign law is the same as English law and swear that he has the right to judgment and, if the defendant wants to say there is a different result by the proper law, it is for the defendant to put that evidence in. That evidence, as it seems to me, the judge is entitled to approach in exactly the same way as he would approach any evidence which is put in by a defendant. He does not have to accept it simply on the say-so of the defendant. He is entitled to test it. …"**

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14. Applying the above principles to this appeal, it seems to me that the Claimant is right to contend that it is not his burden to plead and establish the position under Dubai law for the purposes of his surviving contractual claims. His position is that, in the relevant respects, Dubai law is the same as that of England and Wales. If the Respondents wish to contend to the contrary, and, in particular, if it remains their intention to apply to strike out the Claimant's contractual claims on that basis, it is first for them to identify the position under the relevant system of Dubai law for which they contend in each of those contractual claims. It will then be for the Claimant to indicate whether, and, if so, in which respects, the Respondents' position is disputed. If and to the extent that there is a dispute as to the effect of the applicable law in Dubai, it will be for the Respondents to adduce evidence in support of their position. I am not thereby indicating that the Claimant should be prohibited from calling his own evidence on the disputed issues, should he wish to do so.

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15. In those circumstances, in my judgment, it is not for the Claimant to produce evidence at this stage, still less for him to be ordered to pay half of the cost of providing that evidence, whether it is to be produced by Herbert Smith Freehills or some other law firm. It follows that, in ordering that he do so, alternatively that a firm of the Tribunal's choosing be instructed on a joint basis, I consider that the Tribunal made an error of law.

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16. The appeal is, therefore, allowed and the matter will be remitted to the same Employment Tribunal for it to give directions in accordance with this Judgment, of which I order that a transcript be provided.

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