Appeal No. UKEAT/0240/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 March 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

RICE SHACK LTD — APPELLANT

MISS D OBI — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD REES (Representative) Peninsula Business Services Ltd The Peninsula Victoria Place Manchester M4 4FB
For the Respondent	MISS DEMITCHIE OBI (The Respondent in Person)

SUMMARY

UNAUTHORISED DEDUCTION FROM WAGES

Unauthorised deduction from wages - section 13 ***Employment Rights Act 1996*** *- zero hours' contract*

The Claimant was an employee of the Respondent, working shifts around her college commitments pursuant to a zero hours' contract. On 6 March 2016, the Respondent suspended the Claimant pending a disciplinary investigation; it accepted before the ET that it had been required to pay her at her normal average weekly rate for the duration of the disciplinary suspension but it had failed to do so. The period of the disciplinary suspension continued until 13 December 2016, with no offers of shifts being made to the Claimant during this period. Meanwhile, the Respondent failed to progress the disciplinary process and matters were left in abeyance until 13 December, when further shifts were offered to the Claimant. In the meantime, on 22 August 2016, the Claimant had accepted other employment; she did not disclose this fact to the Respondent. The ET found that the Claimant had declined the offer of shifts for the Respondent in December 2016 as she no longer wished to work for it. Prior to that point, however, the Respondent had not made any offer of shifts to the Claimant because of the disciplinary suspension and she had therefore been entitled to be paid (at her normal average rate) for that period.

The Respondent appealed, contending once the Claimant obtained work with another employer, there were no sums "properly payable" to her for the purposes of section 13(3) **Employment Rights Act 1996**, alternatively her failure to disclose her other employment meant she should not have been entitled to wages from the Respondent after 22 August 2016.

Held: *dismissing the appeal*.

As the Respondent accepted, under her contract of employment, the Clamant was entitled to accept other employment and was under no obligation to notify the Respondent of this. It

further accepted that it was unable to say whether the Claimant would or would not have accepted shifts offered prior to 13 December 2016 because she had been offered none due to the disciplinary suspension. The Respondent could not point to any conduct on the part of the Claimant that would have entitled it to summarily dismiss her (had it been aware of that conduct at the relevant time); she had thus remained entitled to be paid during the period of disciplinary suspension.

HER HONOUR JUDGE EADY QC

1. This appeal raises the question as to an employer's obligation to pay an employee working pursuant to a zero hours' contract during a disciplinary suspension, when - unbeknown to the employer - the employee has obtained other work.

2. In giving my judgment, I refer to the parties as the Claimant and Respondent, as they were below. This is the Full Hearing of the Respondent's appeal from a Judgment of the Manchester Employment Tribunal (Employment Judge Tom Ryan, sitting alone on 9 February 2017; "the ET"). The Claimant represented herself before the ET, as she has done today. The Respondent was then represented by Peninsular Consultants, albeit not by Mr Rees who now appears. By its Judgment, the ET upheld the Claimant's claim of unauthorised deductions from wages, awarding her the sum of £4,087. The Respondent appeals against that Judgment albeit accepting that the Claimant was entitled to an award of damages as between 6 March 2016 to 22 August 2016. It contends that thereafter - until the ET found that her employment ended on 13 December 2016 - the Claimant had no continuing entitlement, because she had obtained other full-time paid employment.

The Relevant Background and the ET's Decision and Reasoning

3. The Claimant started her employment with the Respondent at one of its food outlets in Manchester in December 2015. She was a college student and worked for the Respondent as a front of house assistant pursuant to what the ET described as a zero hours' contract; that is, for such work as might be available, without any commitment to particular hours on either side, at the rate of £6.70 per hour. The Claimant and other employees would subscribe to a WhatsApp group and would have shifts allocated through this means. It was common ground

A that the Claimant averaged some 15 and a half hours per week for the Respondent, giving an average weekly level of remuneration of £102.50.

B 4. On 6 March 2016, the Claimant was suspended after an altercation at work. This was said to be pending a disciplinary investigation. After this, no shifts were allocated to the Claimant. As the ET recorded, there was nothing in the Respondent's contract with the Claimant expressly giving it the power to suspend and it was accepted by the Respondent's C representative before the ET that if it did suspend the Claimant there was no basis for it to do so without pay unless there was an expressed contractual provision to this effect, which there was not.

D 5. After some initial attempt to organise a disciplinary hearing, the Claimant heard nothing further and, on 23 May 2016, she submitted a written grievance in which she raised various complaints, including the fact that she had been suspended without pay and had not E been offered work, notwithstanding that she remained willing to work. There was a grievance meeting on 2 June 2016 and the Claimant chased for notes from this on 6 June.

F 6. Other than that, however, nothing seems then to have happened until the Respondent contacted the Claimant on 13 December 2016 to offer her some shifts. The Claimant responded on 16 December to say she was willing to return to work providing she was paid G the outstanding sums due to her since 7 March, and she further reminded the Respondent she was still awaiting a response to her grievance.

H 7. In the meantime, on 25 July 2016 the Claimant had lodged her ET claim which included her complaint of having suffered unauthorised deductions from wages. In

September 2016, there was a Preliminary Hearing before Employment Judge Feeney, at which the Claimant was directed to produce a schedule of loss and disclose documents relating to mitigation. In due course, she produced a schedule of loss, setting out the wages she said she had lost since March; she disclosed no documents relating to mitigation.

8. In fact, however, the Claimant had been looking for other work from as early as May 2016 and had obtained another job, starting full-time work with a call centre company as from 22 August 2016, in which she was earning significantly more than she had been paid by the Respondent. As the Claimant had disclosed nothing relating to her attempts to mitigate, the Respondent was however unaware of this new employment until its representative - who coincidentally also undertook work for the Claimant's new employer - learned of this, apparently in or around January 2017.

9. When the case came before the ET on 9 February 2017, the parties were in agreement that the Claimant's employment with the Respondent had still not been determined: she had neither resigned nor been dismissed and it could not be said that the contract had been frustrated.

10. Had it not been for the disciplinary process that the Respondent had elected to commence, the ET explained that it would have been inclined to conclude that the Claimant had, after a reasonable period of time, failed to tender herself for work; it did not accept her evidence that she had made it clear that she was available for work at the grievance hearing on 2 June 2016. The ET also found, however, that the Respondent had failed to contact the Claimant regarding the outstanding disciplinary process and concluded that this meant she

had remained suspended; a state of affairs that was the responsibility of the Respondent (albeit the ET accepted this had not been intended).

11. Given the Claimant's continued suspension, the ET found she had remained entitled to be paid at a level representing her average remuneration with the Respondent until 13 December 2016, when the Respondent had effectively invited the Claimant back to work. It rejected the Claimant's evidence that she only refused the Respondent's offer of shifts at that point because she had not been paid; the ET found she had then not wished to return to work for the Respondent. The ET suspected that, had the Respondent been aware of the Claimant's new employment earlier, her contract with it would have been terminated. That, however, had not happened and the ET thus concluded that the Claimant was entitled to be paid for the 40 weeks of her continued suspension, until 13 December 2016.

The Appeal and the Parties' Submissions

The Respondent's Case

12. The Respondent has appealed against the ET's Judgment on the basis that, as the ET found, the Claimant had started full-time employment elsewhere as from 22 August 2016 and had not disclosed this. That, it contends, raises the question whether 22 August should have been the cut-off point for the wages award, objecting that the ET apparently failed to consider section 13(3) of the **Employment Rights Act 1996** ("the ERA"), which provides:

> **"(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

13. The Respondent contends that, as a matter of law, it cannot be right that an employee who commences employment with another employer - thereby making themselves

unavailable for employment with the original employer - is entitled to an award of wages for the period in which that employee is not able to fulfil the contract of employment. It contends that it must follow, as a matter of law that the contract of employment terminates as at the date that the employee made him or herself unavailable. In the alternative, it argues wages cannot be "properly payable" within the meaning of the **ERA** for the period in question.

14. In oral submissions Mr Rees, for the Respondent, has accepted that where there was a disciplinary suspension at the employer's request, the employee would be entitled to be paid average earnings whilst that disciplinary suspension continued. The Respondent's objection in this case centred on its contention that the Claimant must have been unavailable for work, and thus not properly due any pay from the Respondent, as from the time when she obtained alternative employment at the call centre. In discussion at this hearing, however, Mr Rees has accepted that he is unable to point to any provision within the Claimant's contract of employment which would either have prevented her taking on full-time employment for another employer, or require her to disclose such employment. The zero hours nature of the contract under which she worked would mean that she could accept other employment, and still accept shifts as offered from the Respondent. Mr Rees further accepts that, given that the Respondent did not offer the Claimant any shifts until 13 December 2016, he was not in a position to suggest that she would have not been prepared to accept those shifts or make herself available for them had they been offered earlier.

The Claimant's Submissions

15. The Claimant has resisted the appeal relying on the fact that her contract expressly provided that it was a zero hours' contract, thus enabling her to choose the hours she worked. She argues that the ET calculated that her employment had ended in December 2016. The

Respondent had submitted that she worked to a zero hours contract, with no set hours. The hours that had been offered in the past had always aligned with the Claimant's college hours - she had always had other commitments when working for the Respondent and she would similarly have been able to accept any offered hours between 6 March and 13 December 2016. Had she been offered any hours by the Respondent, it would (as previously) have been the Claimant's choice whether to accept or reject hours aligned with the hours of her call centre job, just as she had previously accepted hours that aligned with her college commitments.

Discussion and Conclusions

16. There is no appeal against the ET's finding that the Claimant's contract of employment with the Respondent continued from 6 March until 13 December 2016, the Respondent having suspended the Claimant throughout that period. It is further accepted, as it was before the ET, that there was no right to suspend the Claimant without pay and that therefore she was entitled to be paid at her average weekly rate, and, to the extent that the Respondent failed to pay her, that amounted to an unauthorised deduction.

17. By its appeal, however, the Respondent seeks to contend that, as from 22 August 2016, the Claimant was not entitled to be paid during her period of suspension because she had obtained alternative employment; the average weekly sums were accordingly not "properly payable" to her from 22 August to 13 December 2016.

18. It is, of course, right to say that, at common law, an employer is entitled to defend a breach of contract claim - for example, for wrongful dismissal - on the basis of facts discovered after the dismissal, which would have justified summary dismissal for gross

misconduct; see **Boston Deep Sea Fishing and Ice Company Ltd v Ansell** [1888] 39 ChD 339 CA. Although the present claim was not for damages for breach of a notice provision, but a claim in debt for unauthorised deduction of wages given the ongoing employment relationship, the Respondent nevertheless contends that it must be entitled to rely on the same principle as that laid down in **Boston Deep Sea Fishing**, arguing that the intent must be to protect the employer from the "undisclosed rogue", whose serious misconduct is only discovered after the event.

19. Even if the Respondent was entitled to rely on that approach, however, it would still have to be able to point to some misconduct on the part of the Claimant, such as would have entitled it to have summarily terminated her employment (so that the average weekly pay she would have been entitled to be paid during her suspension would no longer have been "properly payable"). This, it seems to me presents an insurmountable problem for the Respondent in this case. As the Claimant points out, and, indeed, as the ET found, the contract between the parties in this case was expressly stated to be a "zero hours' contract". As Mr Rees has fairly accepted, there was no obligation on the Claimant not to accept other employment, let alone to disclose to the Respondent what other employment she might have taken on. Previously the Claimant had been attending college and thus would have had other commitments relating to her studies; it was not suggested that this meant she was not entitled to be paid her normal average weekly pay during her period of suspension. Moreover, as the Claimant has told me - and as seems entirely consistent with the ET's findings and the nature of the contract in this case - other employees of the Respondent also had other employments, which they had accepted whilst continuing to work shifts for the Respondent; there was no suggestion that they were required to tell the Respondent of any such other employment, still less that they were in breach of their contracts by taking on that other work.

20. In other circumstances, an employer may well be entitled to expect an employee not to accept other work or there may be a requirement upon the employee to disclose such other employment; the precise nature of the obligation in either respect will inevitably depend on the terms of the contract. Where such an obligation does arise, I can allow that - even if the employer had not learned of the employee's conduct before terminating the contract - it would be open to it to argue that such conduct amounted to a breach of contract that would have entitled it to summarily dismiss the Claimant at the point when the conduct occurred. I cannot, however, see how that would work with a zero hours' contract of the nature in this case. There was simply no obligation upon the Claimant to behave in the way the Respondent has sought to suggest.

21. Ultimately the problem the Respondent has identified in this case is entirely one of its own making. It chose to enter a contract with the Claimant of a zero hours' nature, such that there was no obligation on her not to accept work for others or to tell the Respondent if she did. This was, no doubt, beneficial for both parties in terms of the flexibility it provided. Certainly, from the Claimant's perspective it meant she was free to take on other commitments and to then accept or decline such shifts as the Respondent offered, at her convenience. It was then the Respondent's decision to suspend the Claimant and to continue that disciplinary suspension, without resolution, from March to December. The (unforced) error made in respect of the continuation of the disciplinary suspension may not have been intended by the Respondent, and is no doubt a matter of some regret, but is the real explanation for why the Claimant's claim succeeded before the ET. In the circumstances, the ET did not err in its approach to section 13 **ERA** and I am bound to dismiss this appeal.