Appeal No. UKEAT/0117/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 September 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR I S NWAKI APPELLANT

TUBE LINES LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	DR BRIAN V IKEJIAKU (Representative) Brian-Vincent Legal Outfit Ltd Rothersthorpe House 4 Billing Road Northampton NN1 5AN
For the Respondent	MR CHRISTOPHER STONE (of Counsel) Instructed by: Eversheds LLP Kett House Station Road Cambridge CB1 2JY

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

A Tribunal was entitled to find, on the facts, that where the Claimant's inability to satisfy his employer that he was legally entitled to continue working in the UK arose as a result of an error on the part of the Border Agency, his dismissal was not unfair.

The fact that the Skeleton Argument served by the Respondent below tended to focus primarily on the issue of "some other substantial reason" did not mean that the Employment Tribunal ("ET") was disentitled to find that the reason for dismissal fell within section 98(2)(d), namely that "the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

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HIS HONOUR JUDGE MARTYN BARKLEM

1. This is the Full Hearing of an appeal following an Order made at a Rule 3(10) Hearing by His Honour Judge Richardson. I shall refer to the parties as they were before the Tribunal.

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2. The case is old. It concerns a dismissal which took place in July 2012, and a Decision of the Employment Tribunal ("ET") sent to the parties on 20 September 2013, following a Hearing on 3 September 2013. Notwithstanding that, the parties are represented today as they were at the original ET. The Claimant by Dr B Ikejiaku, a representative, and the Respondent by Mr Christopher Stone of counsel.

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3. It is common ground that the Claimant was dismissed by the Respondent because he was unable to demonstrate that he had the right to work in the UK. There seems to have been no serious challenge to the position as set out in the skeleton argument prepared by Mr Stone on the Respondent's behalf at the Hearing below, namely that the Claimant's application for a Tier 1 visa had twice been rejected by the UK Border Agency. Judicial Review proceedings had been brought by the Claimant in relation to this and the Reasons record (see paragraph 6), that his application had been refused both on the papers and following an oral Hearing. He was, at the time of the ET's Hearing, awaiting a hearing date from the Court of Appeal as to his permission to appeal.

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4. The dismissal was evidently made with reluctance, because it is not in dispute that the Claimant was a valued employee but the consequences faced by an employer who was not able to establish an employees' entitlement to work in the UK were grave. Following his dismissal, the Claimant brought a claim in the Tribunal asserting unfair dismissal.

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5. The Respondent's ET3, in the form which was before the Tribunal, recited the Reasons for the dismissal as follows and I cite it with the typographical and grammatical errors intact:

> **"2. The Respondent has held a number of discussions and meetings with the Claimant to seek to establish the Claimant had right to work but to no avail. The Claimant has only been able to produce limited correspondence from his solicitor in an attempt to prove his right to work in the UK which the Respondent did not consider it satisfied its obligations to establish that its employees have to have a right to work in the UK.**
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> **3. The Respondent has on two occasions submitted an Employers Enquiry Form to the UK Border Agency, on 3rd May 2012 and 2 July 2012, with the Claimant's consent. On both occasions that UK Boarder Agency was unable to confirm that the Claimant was entitled to work in the UK on the basis of an outstanding application.**
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> **…..**
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> **6. The Respondent submits that it had a fair reason pursuant to section 98(1)(b) of the Employment Rights Act 1996 for dismissing the Claimant namely, for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held. The Respondent submits that, having regard to its size and administrative resources, it acted reasonably in treating this reason as sufficient reason for dismissing the Claimant. The Respondent had a reasonable belief that the Claimant did not have the right to work in the UK."**

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6. The Respondent's skeleton argument made reference to section 98 of the **Employment Rights Act 1996** citing sub-sections 1, 2 (d) and 4 of that section. Section 98(2)(d) reads:

> **"(2) A reason falls within this subsection if it—**
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> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."**

7. At paragraph 7 of the skeleton argument, it was pointed out that an employer may rely on

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section 98(2)(d) where continued employment of the employee would actually have contravened a duty or restriction imposed on it by an enactment. *Where this condition is not in fact satisfied but the employer reasonably believed that it was, the employer may be able to rely on that belief as being some other substantial reason justifying the employee's dismissal.* [Emphasis added by

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8. The skeleton argument went on to set out the law relating to offences and penalties to

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which employees were potentially liable and then, at paragraphs 10 and following, set out the relevant law as to whether the Claimant in fact had the right to work in the UK. Paragraph 13

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reads in summary, "pursuant to section 3(c) of the **Immigration Act 1971** together with the relevant sections of the **Nationality, Immigration and Asylum Act 2002**, an application for a variation of limited leave to enter has the effect of extending that leave and therefore the right to work in the UK until the outcome of that application and any appeals has been determined.

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9. The skeleton argument went on to point out that an application for Judicial Review fell outside the appeal process provided for by section (3)(c) and was, therefore, not relevant.

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Consequently, the Claimant's continued employment would have been in contravention of the Respondent's duty not to employ someone subject to immigration control and potentially would have constituted an offence.

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10. In his Decision, the Employment Judge ("EJ") drew on the Respondent's skeleton argument, citing at paragraph 3 of the Reasons the point at paragraph 7 of the skeleton argument, summarised above, as to reliance on 98(2)(d) being permissible only when the contravention of

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a duty or enactment had been proved. The Judge then incorporated paragraphs 8 to 13 of the skeleton argument and the legal provisions contained therein into his Reasons, more or less unchanged, other than to make it clear that it was the Judge making the point and not, as in the

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skeleton, this being a matter of submission. I make that observation not in any way critically but to make clear that the findings of the Judge on that point were very much before him and constituted the Respondent's case. This is not a case where the Judge departed from the

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submissions of the Respondent.

11. The Judge accepted the Respondent's submission that, his work permit having expired on 20 April 2011, the Claimant could only retain the right to work while:

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> **"An application for variation of his leave to remain had been neither decided nor withdrawn.**
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> **While an appeal to the Asylum and Immigration Tribunal could be brought or**

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While such an appeal was pending and if none of these conditions were satisfied then the Claimant had no right to work within the United Kingdom."

12. Having then summarised the evidence which was before him at paragraphs 22 and 23 of the Reasons, the Judge made the following findings:

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"22. On the evidence before the Respondent and indeed before me there are no extant applications to the United Kingdom Border Agency and no evidence of a valid statutory appeal to the Asylum and Immigration Tribunal. I am satisfied that the Claimant was dismissed because he could not demonstrate that he had the right to work. His dismissal in my judgment fell within Section 98(2)(d) of the Employment Rights Act because it is the case regrettably that he does not have the right to work in the United Kingdom.

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23. Accordingly it was a fair dismissal and a fair procedure. I add that I am sorry for the Claimant because clearly he was a good worker and the decision to dismiss had nothing to do with his qualities as a man or an employee but was concerned solely with his technical status as a person without the right to work in the United Kingdom."

13. In the skeleton arguments advanced on behalf of the Claimant, the thrust of the argument

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was that the Respondent did not demonstrate any conclusive evidence from any public authority stating that the Claimant has no work permit or is not entitled to work. It is argued that the Respondent had no reasonable belief that the Claimant had no right to work. The skeleton arguments cited **Klusova v London Borough of Hounslow** [2007] EWCA Civ 1127.

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14. However, that is a case where the Tribunal had found that the Claimant had made a valid application for leave to remain, which, for the purposes of section (3)(c) of the **Immigration Act**

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1971, had not been determined when the Council dismissed her. That is not the position in the present case.

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15. Other grounds of the skeleton argument were predicated upon the assumption that the Hearings were of a disciplinary nature stressing the Claimant's exemplary record and/or asserting that this was a "calculated plot" to ensure that the Claimant was dismissed by all means. That is a reference to an email, which I have read: Its context is, I think, that the Respondent was keen

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to ensure that the inevitable dismissal was correctly labelled given the unusual circumstances and

was written in an attempt, vainly as it proved, to avoid Tribunal proceedings. I do not accept, not that it is a matter for me, that this evidence is of any "calculated plot." The ET accepted that the Claimant was a dedicated worker as can be seen from paragraph 23 of the Reasons.

16. The grounds of appeal were summarised by His Honour Judge Richardson when he allowed the matter to proceed following the Hearing under Rule 3(10) as follows:

> **"The grounds of appeal are discursive but after discussion with the Claimant's representative, I consider (and he agreed) that they boil down to the following points which I consider reasonable arguable.**
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> **1. The Employment Judge erred in law in holding that the Respondent's reason for dismissal fell within section 98(2) of the Employment Rights Act 1996 in the following ways**
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> > **(1). he reached his conclusion when (i) it was not the Respondent's case, (ii) the Claimant representative objected and (iii) there was no amendment to the ET3 (which relied on some other substantial reason)**
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> > **(2) he reached this conclusion without making findings as to the state of mind of the person dismissing the Claimant**
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> > **(3) he reached this conclusion without considering or ruling on the Claimant's case that he had made a valid in-time application**
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> **2. The Employment Judge ought to have considered whether the Respondent's reason fell within section 98(1)(b) and (if he found that it did) ought then to have considered the statutory test in section 98(4) in that context.**
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> **I did not require a formal amendment; I think these points are within the existing grounds; if the Respondent disagrees, and wishes to take a point about it, then it may write in to say so at the same time as it lodges an Answer."**

17. Judge Richardson went on to say that the ground 1.1 depends at least in part on what happened at the hearing. He said that the ET3 and the Respondent's skeleton is very clear on that. As far as the second ground is concerned, he commented that there would have been a contravention of section 98(2)(d) only if it were established that there had not been a valid in-time application. He said it was reasonably arguable that the ET did not appreciate that this was an issue for it and did not address it.

18. In the brief skeleton argument served on behalf of the Claimant today, it is submitted that the Judge's finding on the basis of section 98(2)(d) when this had not been relied on by the

Respondent was a grave error of law. It is also said that the approach was objected to at the time but not accepted by the Tribunal.

19. The Respondent in its skeleton argument accepts that the ET3 was limited to arguing "some other substantial reason", but points out that the evidence adduced before the Tribunal was directed squarely at establishing that there was in fact no right on the part of the Claimant to work as at the date of his dismissal. There had been no arguments on the part of the Claimant other than that his application had been refused and that the only remaining "appeal" against that was one of Judicial Review.

20. The Judge had made factual findings of a nature, which satisfied an even higher evidential burden, the matter of reasonable belief on the part of the Claimant finding on the evidence that the Claimant was not entitled to work in the UK as at the date of the dismissal.

21. When the matter had come before Her Honour Judge Eady QC on the Rule3(7) sift, she had commented as follows:

> **"Having been able to consider the legal position, the ET was satisfied that the facts relied on by the Respondent were properly to be considered under Section 98 (2) (d). I do not consider that the ET thereby erred in law in considering the facts relied on by the Respondent under one statutory provision rather than another. The reason for a dismissal is to be determined by the ET as the facts or beliefs that led the employer to decide that the employee's employment should be terminated. It is not bound by the particular statutory label used by the employer but it is entitled to itself determine whether the set of facts/beliefs in question under one or other of the provisions of Section 98 (1) or (2)."**

22. She also pointed out that the fact that the ET considered that the dismissal would also meet the higher standard required by section 98(2)(d) does not detract from its findings as to what the Respondents believed at the time.

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23. Mr Stone relies on **Hannan v TNT-IPEC UK Limited** [1986] IRLR 165, a case of the Employment Appeal Tribunal presided over by Hutchison J. At paragraph 22 of the Judgment, the Judge said this:

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> **"22. It seems to us that one can summarise the distinction between the two lines of authority to which we have referred in this way, that where the different grounds are really different labels and nothing more then there is no basis for saying that the late introduction, even without pleading or without argument, is a ground for interference on appeal; but that where the difference goes to facts and substance and there would or might have been some substantial or significant difference in the way the case is conducted, then of course an appeal will succeed if the Tribunal rely on a different ground without affording an opportunity for argument. For the reasons which we have endeavoured to express, we are persuaded that Mr Field is correct when he says that in the present case the distinction is in truth one of labels and that there are no grounds for thinking the case would have been conducted in any significant way differently or more thoroughly investigated or the cross-examination or the evidence called would have been in any way significantly different had the case, as ultimately relied upon by the Industrial Tribunal, been pleaded or canvassed in evidence."**

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24. Mr Stone submits that the present case is quintessentially a case of labelling. Precisely the same issues were engaged whether one looked at whether the Respondent had grounds amounting to some other substantial reason in the form of its reasonable belief in the Claimant's entitlement to work in the UK, or whether, albeit it is a higher burden, the Claimant was not in fact, as the Judge found, so entitled. There could have been no prejudice to the Claimant whose argument as to his entitlement to remain in the UK was at the forefront of his case.

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25. There has been no agreement as to the precise evidence which was before the Tribunal, which is hardly surprising given the lapse of time and the fact that the Employment Judge has now been appointed to the circuit bench. However, it is abundantly clear to me from the Reasons that the Claimant's work permit status was manifestly in issue. I cannot see what other evidence could possibly have been adduced that would not otherwise had the issue simply been "SOSR".

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26. I asked Dr Ikejiaku today what other lines of enquiry might have been open and how the case might have been differently presented on the Claimant's part, had the issue been limited in that way. The response, although far from clear, seemed to focus on the reasonableness of the

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employer's belief that the Claimant was unable to work. The point was made that the Claimant was eventually successful in the Court of Appeal.

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27. That does not seem to me to be relevant. I accept, as I believe the ET did at the time, that the inability on the Claimant's part to demonstrate that he had a right to work was through no fault of his. A mistake seems to have been made on the part of the Border Agency. The point is also made that the Respondent failed to seek independent legal advice before dismissing the Claimant.

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28. That comes from a letter, not in the bundle for the appeal, which was handed to me today. It is from the Border Agency. It is addressed to the Respondent and is dated 3 May 2012. Having said in an emboldened paragraph that the writer "cannot confirm that this individual is currently entitled to work in the United Kingdom on the basis of an outstanding application," it went on to say:

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> **"Unless your employee is able to provide you with appropriate evidence of their entitlement to work, you will not have a statutory excuse against liability for payment of the civil penalty for employing an illegal migrant worker. Where you are no longer satisfied that a current employee is entitled to work in the United Kingdom, we recommend seeking independent advice from a specialist employment law before taking any further action."**

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29. I do not accept that the last paragraph is other than a back-covering exercise on the part of the UK Border Agency. It gives a recommendation, which has no legal force. It is the prior paragraph which to my mind is of more obvious significance. The case was all about the inability of the Claimant to provide that proof. I am satisfied that there was no prejudice to the Claimant as explained in **Hannan**.

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30. Recognising as I do that I have the benefit of more material than was before Judge Richardson, I respectfully disagree with his statement that the Respondent's skeleton argument

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was clearly limited to the "SOSR" point. I consider that it fully covered both that point and the 98(2)(d) point, albeit not seeking to amend the ET3.

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31. I find myself in full agreement with the comments of Judge Eady QC which I have mentioned above. This was in truth no more than a labelling issue. The ET's Decision contained no error of law and I dismiss the appeal on both grounds. I am grateful to both Mr Stone and Dr Ikejiaku for their submissions today.

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