Appeal No. UKEAT/0102/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 September 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR U M NWAKWU — APPELLANT

WESTMINSTER CITY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR UZOMA MARTIN NWAKWU (The Appellant in Person)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Disposal of appeal including remission

The Respondent to the appeal conceded that the Tribunal had erred in its approach to time limits in the Claimant's claim for breach of the **Agency Workers Regulations 2010**. The parties could not agree whether the matter should be remitted back to the same or a fresh Tribunal. On applying the familiar authority of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT, the matter is remitted to a fresh Tribunal for re-hearing on the discreet issue on which the appeal was successful.

HER HONOUR JUDGE STACEY

1. This is the appeal from the Judgment of Employment Judge J Tayler and members (Ms S Samek and Mr I McLaughlin) held in London Central Employment Tribunal between 30 May and 5 June 2017. A Reserved Judgment and Reasons, sent to the parties on 18 July 2017 dismissed all the Claimant's claims. The Appellant in this Tribunal was the Claimant below, and I shall continue to refer to him as the Claimant, consistent with the appeal Tribunal **Practice Direction** at paragraph 16.4.

2. The Respondent had conceded the four grounds of appeal that were permitted to go forward at a Rule 3(10) Hearing by Her Honour Judge Eady QC, and the only live issue remaining in the appeal is the question of disposal and remission, and the application of the guidance in the familiar authority of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT to the circumstances of this case.

3. The history and background is as follows. The Claimant brought a number of claims before the Employment Tribunal concerning his treatment by the Respondent from September 2012 to June 2016 when he was assigned as an Agency Worker at Westminster City Council. He brought claims of race discrimination (direct and indirect), harassment, victimisation and breaches of the **Agency Workers Regulations 2010** ("AWR") and various other claims including unlawful deduction of wages. The only claims relevant to his appeal are the claims under the **AWR** although there is a slight overlap with his complaint of unlawful deduction of wages contrary to Part II **Employment Rights Act 1996** as discussed further below.

4. Before the Tribunal, the issues had been carefully and helpfully set out at a Preliminary Hearing before Employment Judge Baty on 13 July 2016. The Claimant, as an Agency Worker, sought parity with some employment terms and conditions with direct employees of the council in three respects (set out at paragraph 8.3 of the Preliminary Hearing Judgment): the right to take one day off a month after accruing enough hours through overtime (which was given the shorthand of "flexitime"); concerns about a lower hourly rate than his directly employed comparators; and thirdly, the provision of one-day special leave during the Christmas period. There is also a complaint which the parties understood and accepted was alleged as a breach of the **AWR** when the withdrawal of flexitime for Agency Workers was alleged by the Claimant to have occurred in October 2015. These has found articulation at paragraph 13 of the Preliminary Hearing Judgment, and, it would seem, from both the Employment Tribunal's Decision and the Respondent's concession on the appeal, that they understood and accepted this to be an Agency Worker complaint as well as an unlawful deduction complaint concerning the withdrawal of the flexitime option for Agency Workers.

5. Time limits were flagged up as a possible issue for the main hearing in paragraph 14.4 of the Preliminary Hearing Judgment.

6. The Employment Tribunal dealt rather cursorily with the **AWR** complaints in paragraphs 59 to 61 of its Judgment:

> **"59. Dealing with the remainder of the allegations set out in the list of issues. The first allegation under the AWR is about the withdrawal of flexitime; being able to take off one day a month after accruing enough hours through overtime. That was done in October 2015. There is a 3 month time limit under the AWR unless the tribunal considers it just and equitable to apply extend [sic] the time limit. As set out in our fight [sic] findings of fact the Claimant considered the change to be unlawful from the outset. We consider that had he wished to bring a claim he could have done so within three months. We do not consider he has put forward any reason why it would be just and equitable to extend time over so long a period.**
>
> **60. The Claimant next alleges that he was paid a lower hourly rate than his comparators. We do not accept that that this [sic] is the case. In any event, the provision of the agency workers regulations rests on determining what the Claimant would have been paid if employed by the Respondent. We accept Mr Vallis' evidence that the relevant pay rate at which the Claimant**

> **would have started if he had been employed is towards the bottom of the local government pay scale that was providing [sic] at the hearing. Even assuming moved up [sic] one pay scale per year the Claimant would have been on a lower rate of pay had he been an employee of Westminster.**
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> **61. The Claimant alleges under the AWR that he was not provided with a day off for Christmas in 2012 and 2013. These complaints are very substantially out of time. The Claimant has shown that he was aware of the right to parity and of the AWR and has not put forward any reason why it would be just and equitable to apply a longer time limit than three months."**

7. The Tribunal rejected the Claimant's complaint that he had received a lower hourly rate of pay on the facts. There is no challenge to that part of the Judgment. But the remaining three matters were rejected on time limits, and they have found form in the four grounds of appeal set out at pages 24 to 28 of the bundle. In essence, ground 1 is that the Tribunal wrongly found that the claim that the withdrawal of the availability of flexitime for Agency Workers was out of time. Secondly, the Tribunal wrongly failed to extend time for that claim on the grounds that it was just and equitable to do so. Thirdly, the Tribunal wrongly failed to extend time in respect of the failure to provide a day of paid leave for Christmas to Agency Workers in 2012 and 2013. And, fourthly, the Tribunal therefore failed to adjudicate on this claim.

8. Following the acceptance by the EAT of the four amended grounds, the claim could proceed. It is necessary, however, to mention a bit of the background, which is that the Claimant is deeply unhappy with the Tribunal Judgment and the way that he perceives that he was treated by the Tribunal in relation to all the complaints, not just those that have been permitted to go forward to an appeal, and he is firmly of the opinion that he has no trust and confidence in the original Tribunal.

9. The Respondent conceded the appeal and argued that the matter should be remitted back to the same Tribunal to make the appropriate findings and an assessment of time limits pursuant

to **British Coal Corporation v Keeble** [1997] IRLR 336, and, if necessary, to revisit the substantive issues should the claims or any of them be found to be in time.

10. The Claimant takes a different view and considers that justice can only be done if a fresh Tribunal is given the task of revisiting the Agency Worker complaints. He has made an able submission today that there is little factual dispute between the parties concerning the Agency Worker claims and that there will be little need for the Tribunal to consider new matters or revisit matters that were before the original Tribunal.

11. I agree with the Claimant that the matters are crisp and clear and that there will be no need for the Tribunal to revisit any of the underlying issues that formed the bulk of the case which was the discrimination complaint before the original Tribunal. I stress that this is not a case where the professionalism of the Tribunal is under scrutiny, notwithstanding the strong views of the Claimant. However, a number of other factors, when considered together, rebut the presumption that the case be remitted to the same Tribunal. There has been a significant passage of time; claims under AWR should be considered by a Judge sitting alone and not a full Tribunal which would make it inappropriate to remit to the same, full Tribunal; little evidence will be required and most of the facts will be agreed; and the other aspects of the original hearing are not relevant to the remitted issues. I am conscious of the Claimant's anxiety, and it is important for him to have confidence in the system and not be distracted at the hearing simply, in order to allay the Claimant's fears, and not, as I say, through any anxiety about the professionalism of this Tribunal. I can see that it makes sense for the case to be heard by a new Judge sitting alone, and that will have the advantage of saving the public purse the cost and the expense and listing difficulties of re-assembling the original full Tribunal.

12. The issues to be determined are those set out in the grounds of appeal permitted to go forward as summarised in paragraph 4 above. By way of clarification, ground 1 includes consideration of the complaint in the alternative as an allegation of unlawful deduction from wages.