Appeal No. UKEAT/0144/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 November 2018

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR A READ — APPELLANT

RYDER LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR WILLIAM YOUNG (of Counsel) Instructed by: IBB Solicitors Capital Court 30 Windsor Street Uxbridge Middlesex UB8 1AB

SUMMARY

TRIBUNAL JURISDICTION: Employer's claim under Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994

An employer can bring proceedings in the Employment Tribunal ("ET") under the 1994 Order only if the employee has brought proceedings in respect of a claim "by virtue of" the Order (Art 4(d)). The EAT held that a claim is brought "by virtue of" the Order only if it must necessarily have been brought under the Order or if it has unequivocally been brought under the Order.

In this case the employee claimed arrears of pay due in his last pay cheque. Such a claim could have been brought under the Order or under Part II of **ERA 1996** and there was no unequivocal indication that it was brought under the Order.

In those circumstances the ET had had no jurisdiction to deal with the employer's counterclaim and the appeal was allowed and the judgment in the employer's favour set aside.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Claimant against the decision of Employment Judge Bedeau sent out on 20 October 2017. For readily understandable commercial reasons, the Respondents have not participated, although they have made it clear that they oppose the appeal. The appeal has been presented very fairly and ably today by Mr William Young of counsel who acted below and has continued to act on a *pro bono* basis in the Employment Appeal Tribunal and I am grateful for his assistance.

2. The Respondent is described in the Judgment as a company which provides fleet management transportation and supply chain solutions to a wide range of businesses nationwide. The Claimant started employment with them on 16 August 2010 as an apprentice. In 2013, he took a course for which the Respondents paid. At the time, he signed an agreement which is set out in the Judgment which basically required him to repay the costs of the course as to 100% of the fees if his employment terminated within 12 months after the course or as to 50% of the fees if it terminated between 12 and 24 months after the course. There was provision for the deduction of monies owing in that respect from salary payments.

3. The Claimant completed his course in July 2015. On 8 August 2016, he gave notice of resignation which expired on 2 September 2016. His final pay package would therefore have been due at the end of September. His case was that he should have been paid £1,400 but the Respondents relied on the agreement for repayment of his course fees by way of set off and paid nothing. That left a further £750 odd to be repaid. The Claimant brought a claim in the ET in respect of the £1,400 odd that he said he should have been paid in his last pay cheque. The Respondent counterclaimed for the £750 odd.

4. The Claimant maintained before the Tribunal that a gentleman called Mr Digby from the Respondent had told him that the 12-month or 24-month periods, which I have referred to, ran from the date of his signature on the contract rather than from the date of completion of his course. If that had been the case, of course, nothing would have been repayable in respect of the course fees. However, looking at the clear terms of the agreement that he had signed and looking at his evidence, the Employment Judge rejected that notion, notwithstanding that Mr Digby did not give evidence himself. The EJ therefore rejected the Claimant's claim and gave judgment in favour of the Respondent in the sum of £758.43.

5. On this appeal, the Claimant says that the EJ was wrong to conclude that he had jurisdiction to deal with the counterclaim. Such jurisdiction can only arise under the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**, SI 1994/1623. Claims by employers are governed by Article 4 of that Order which says this:

> **"Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—**
>
> **(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**
>
> **(b) the claim is not one to which article 5 applies;**
>
> **(c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and**
>
> **(d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order."**

There is no dispute that the Respondent's claim satisfied (a), (b) and (c). The issue is whether the Claimant had brought a claim before the ET "by virtue of" the 1994 Order, so as to satisfy (d). Article 3 of the Order lays down three requirements for a Claimant to bring a claim under the Order, namely (a) that the courts of England and Wales would have jurisdiction and that it comes within section 131(2) of the **1978 Act;** (b) that the claim is not one to which Article 5

applies; and (c) that the claim arises or is outstanding on the termination of the employee's employment.

6. The starting point was obviously the Claimant's ET1 form which is at pages 29 and 30 of my bundle. At page 29 are the familiar "tick boxes". The Claimant, who I am told filled out the form in person, ticked a number of boxes indicating that he was owed "notice pay", "holiday pay" and "arrears of pay". At paragraph 8(a) where he was required to set out the details of his claim, he recited the fact that he had given his resignation on 8 August and that his last working day was 2 September 2016. He then said his last pay cheque was due from the company on 28 September 2016, and that it was to include 10 days of accrued annual leave and the two days worked in September, but that it had been withheld. He then set out the amount for holiday pay, an amount for salary for the two days, giving a net amount of £1,428.57. That is the sum I have referred to earlier as £1,400 odd.

7. The EJ dealt with the question of jurisdiction very briefly at paragraph 59 of his Judgment:

> **"59. In the claim form the claimant stated that he was seeking notice pay which is treated by the tribunal as a breach of contract claim. The issue for me to hear and determine was, in essence, a contractual one. Under rule 23 a respondent can include a contract claim as part of its response. I have, therefore, come to the conclusion that there is jurisdiction to hear and determine the respondent's contract claim."**

8. As I have recited, the ET1 form did indeed include a tick on the box relating to "notice pay". But that phrase is itself ambiguous since it can refer to a claim for damages for summary dismissal or it can refer to a claim for pay due in respect of a notice period. In fact, in this case, it was clear from the text that I have referred to that the Claimant was claiming arrears of pay for work actually done during the notice period which he said should have been included in the final payslip and "holiday pay" in respect of untaken holiday. A claim for "holiday pay" can only be brought in the ET. The claim for arrears of pay could have been brought in the courts and by

A extension under Art 3 of the **1994 Order** or it could have been brought in the ET under Part II of the **Employment Rights Act 1996** as an unlawful deduction from wages. The question therefore arises whether a claim that could be brought by an employee in the ET under another provision of employment law but also under Art 3 of the **1994 Order** is brought before the ET "by virtue of" the Order for the purposes of Art 4(d).

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9. Clearly, the purpose of Article 4(d) is to limit the scope of employers' claims to cases where a Claimant is treading outside the normally understood employment jurisdiction of the ET. It may well have been considered reasonable by the legislature that in a case like that the employer should be entitled to bring some kind of counterclaim. However, it seems to me unlikely that the intention was to allow a counterclaim by the employer in the ET where the employee's claim could have been brought in the ET without reference to the extension of jurisdiction provided by the Order. In my judgment, unless a claim brought by a Claimant either must necessarily have been brought under the Order or is unequivocally brought under the Order, it should not be considered to have been brought "by virtue of" the Order for the purposes of Article 4(d).

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10. The Claimant's arrears of pay claim could have been brought in the ET under Part II of the **ERA 1996** and it was certainly not brought unequivocally under the Order. In those circumstances I do not think that it can be said to have been brought "by virtue of" the Order. Accordingly, Art 4(d) was not satisfied and the ET had no jurisdiction to consider the employer's claim. The EJ was therefore wrong as a matter of law to find that he had jurisdiction to deal with the employer's claim.

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11. Unattractive as the Claimant's position may be, I must therefore allow his appeal and set aside paragraphs 2 and 3 of the Judgment.

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