Case Number: 3303048/2018
3307212/2018
3330799/2018
3335636/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr W Adelaja	**v**	**Atalian Servest Group Ltd**

Heard at: Watford

On: 5 & 6 November 2019 & 7 November 2019 (for deliberation and announcement of the judgment)

Before: Employment Judge Andrew Clarke QC (sitting alone)

Appearances:

For the Claimant: In person
For the Respondent: Mr K McNerney, Counsel

JUDGMENT

1. The application on behalf of the claimant to adjourn the hearing pending the outcome of an appeal to the Employment Appeal Tribunal is refused.

2. The hearing will continue on the basis that the judgment (with reasons) on the merits will not be promulgated until the outcome of the appeal is known. If the appeal should succeed, then the judgment and reasons will not be promulgated, but the matter will be re-heard (together with the allegations of race discrimination previously struck out) by a full tribunal chaired by a different employment judge.

3. The parties are to inform the tribunal as soon as reasonably practicable after the outcome of the appeal is known.

REASONS

1. At the commencement of this hearing the claimant made an application to adjourn. In order to consider that application I need to set out a little of the procedural history of these four cases.

2. There have been two preliminary hearings in these claims. The first took place on 11 December 2018 and the second on 2 May 2019. Both took place before Employment Judge R Lewis. At the time of the December hearing only two of the four claims had been the subject of responses from the respondent and the fourth claim had not been made, but was anticipated consequent upon the claimant's recent dismissal.

3. As the December preliminary hearing records, Employment Judge Lewis sought to clarify the issues in the case, especially with regard to race discrimination. He gave directions and fixed a further preliminary hearing by which time he had hoped that those claims would have been clarified further and the shape of the whole case (from all four claims) would be clear.

4. As the record of the second preliminary hearing makes clear, the nature of the race discrimination case was still unclear by May 2019 and the judge declined to make further orders directed to obtain clarity. Employment Judge Lewis sought to clarify the claims there and then and encapsulated them, so far as he was prepared to permit them to proceed, in paragraph 25 of that record.

5. The employment judge also made Deposit Orders, both in the sum of £50, in respect of, firstly, the unfair dismissal and unpaid wages claims and, secondly, the race discrimination claim.

6. The claimant did not apply for reconsideration of those orders within time, nor did he appeal to the Employment Appeal Tribunal within the 42 day time limit. He did write to the tribunal on 11 July 2019 complaining both as to the making of the orders at all and as to their quantum. That was not regarded as an out of time application for reconsideration, in any event it did not more than repeat points made at the preliminary hearing.

7. The claimant paid the deposit with regard to the unfair dismissal and Wages Act claims. Consequent upon the non-payment in respect of the discrimination claim that claim was struck out. A notice to that effect was sent to the parties on 24 October 2019. On the following day the claimant appealed to the Employment Appeal Tribunal on two bases: firstly, that the Deposit Order should have been made in a lower sum and, secondly, that the judge should not have made the order on the facts which the claimant asserted the judge did not understand.

8. Today the claimant made an application to adjourn the hearing of his unfair dismissal and unlawful deduction claims pending the outcome of that appeal. The respondent opposed this on the basis that the application was

made late in the day and the appeal, being manifestly out of time, was doomed to fail.

9. I disregard the lateness of the application. Whether to continue with the hearing of the case is something that I would have been bound to consider once I knew of the existence of the appeal.

10. There is no dispute as to the following:

    10.1 The issues before me and those in the discrimination claim are inextricably bound together;

    10.2 The respondent's evidence would be significantly more extensive if it had to address the discrimination claim;

    10.3 The findings of fact I might make would have to be revisited if a discrimination claim was subsequently allowed to proceed;

    10.4 The reconsideration would not be mine alone (assuming I was to sit on the second case) because a discrimination claim would require members to sit with the judge.

11. The respondent's answer to those points in favour of adjourning is to rely on the unlikelihood of the appeal being allowed to proceed at all due to it being out of time.

12. In order to assist with my task of deciding how to proceed, I asked my clerk to contact the Employment Appeal Tribunal to see if the appeal had been received and, if it had been, whether it had yet been considered by the registrar. He was informed that the appeal had been received, but that the registrar had not yet looked at it. It was indicated to him that the registrar (or some other appropriate person) might be prepared to look at the case as a matter of urgency were I to write explaining the circumstances. I therefore sent an email to the EAT (attention the registrar) explaining why early consideration would be of assistance. I explained to the parties what I proposed to do and adjourned the case until 10am on Wednesday 6 November when I said that I would give my decision on the adjournment application.

13. I now turn to that application. It would appear that the appeal is presented out of time and I find it difficult to discern any point of law. However, despite the Employment Appeal Tribunal's jurisprudence on late appeals, it is clearly possible that the appeal will be allowed to proceed. It would be wrong for me to enquire into the prospects of that happening any further: for me to do so would be to usurp the role of the EAT. Nevertheless, I consider that I am entitled to take by scepticism as to the prospects of the appeal being allowed to proceed into account in deciding how to proceed with this application to adjourn.

14. I have decided that I will hear the case limited to the unfair dismissal and non-payment of wages claims. If, before I am ready to give my reasoned judgment, the EAT has declined to allow the appeal to proceed, I will then give that judgment with reasons. If not, I will write my judgment with reasons, but they will not be promulgated until after the appeal has been resolved. If the appeal should succeed they will never be promulgated and the case (including the claim for race discrimination) will be heard by a full tribunal chaired by a different employment judge.

15. I believe that this course best serves the interests of justice. There is a risk that some two to three days of tribunal time would be wasted and there may be arguments at a further hearing about whether witnesses have changed their evidence. Those points seem to me to be outweighed by the risk that a case which is ready to be heard will have to be re-listed for a hearing long in the future when memories have faded further.

16. After I gave judgment orally to the above effect, I proposed to continue to hear the case. However, the claimant had not attended. On being called the claimant informed my clerk that he believed that the case had been adjourned until the hearing of the appeal. That was not so. I had explained carefully to all parties that the tribunal had contacted the Employment Appeal Tribunal (see above) and that it was hoped that the registrar might be able to consider the case should I write to the registrar explaining the circumstances, which I proposed to do. I made clear that any decision by the registrar as to whether or not to permit what appeared to be an out of time appeal (of questionable merit) to proceed would influence my decision on the adjournment application. I made it abundantly clear that I would reflect further on that application overnight and would give my decision when the case resumed at 10 o'clock on Wednesday morning. I repeated this and ascertained that the claimant understood the position. I then reiterated to everybody that the case was adjourned until 10am on Wednesday morning.

17. I set out my recollection of these matters orally after giving the respondents my decision as to the adjournment application. I asked counsel for the respondent for his recollection of the events of the previous day. He informed me that both he and his witnesses all had the same recollection as me, namely that I had made the position abundantly clear to everyone, hence their attendance on Wednesday morning.

18. I then asked my clerk to telephone the claimant and inform him that my decision was to go ahead to hear the case and that I would resume the hearing at 12 noon in order to give him time to get to the tribunal. The claimant informed my clerk that he could not attend as he could not arrange childcare for his son.

19. In deciding how to proceed I then kept in mind that I had made it quite clear on Tuesday that the case would resume on Wednesday morning. The claimant had not then raised any difficulty in his attending. This case was always listed to take place over a number of days which included Wednesday

6 November. In the circumstances I decided that the case should proceed in the claimant's absence starting at 12 noon. I asked my clerk to relay that decision to the claimant by telephone, which he did.

20. I heard from the respondent's witnesses and, having read the claimant's witness statement, his submissions document and the material documents in the bundle, I questioned those witnesses with regard to the claimant's various assertions.

21. In accordance with my ruling I will now prepare a judgment with reasons on the merits of the case, which judgment and reasons will not be promulgated until the outcome of the appeal is known. If the appeal is allowed, they will not be promulgated at all and the case will proceed in the way indicated above.

22. Although he had not attended at all on Wednesday 6 November the claimant attended the tribunal on Thursday 7 November. I had given the above judgment with reasons orally at 10am on Wednesday 6 November. However, it had not been tape recorded. As the claimant attended the tribunal, I decided to give the judgment again, this time dictating it, substantially in the form set out above. This was done in his presence. The respondents were informed that this is what I intended to do, but declined to attend. At the conclusion of proceedings, I ascertained that the claimant understood that I had heard the evidence yesterday in his absence and how I proposed to proceed. He acknowledged that he did understand that. He made no comment as to his absence on Wednesday, or the reasons for that absence.

23. On Friday 8 November, I learned that a judge at the EAT had dismissed the appeal as being without legal merit and out of time. Hence, both judgments (with reasons) will now be promulgated.

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Employment Judge Andrew Clarke QC
19 November 2019
Date: ……..
19 November 2019
Sent to the parties on: .....

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For the Tribunal Office