Appeal No. UKEAT/0233/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 December 2019

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

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1) AFTALA NORFOLK LTD T/A PAPA JOHN'S PIZZA
2) WHITESTONE NORWICH LTD T/A PAPA JOHN'S PIZZA APPELLANTS

MISS A P READ RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR BERNARD WATSON (Representative) Peninsula Business Services Ltd Victoria Place 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MISS ANNIE READ (The Appellant in Person)

SUMMARY

PRACTICE AND PROCEDURE

An ET erred in law in holding that two Respondents, each of which operated a separate franchise of Papa John's Pizza in Norwich but was independently owned and managed were jointly and severally liable for awards made to the Claimant. No legal basis was given for the finding and the evidence pointed unequivocally to the First Respondent having been the employer. The Claimant having been seconded to the Second Respondent on occasion did not give rise to a liability on the Second Respondent's behalf.

However the ET did not err in permitting the Claimant's solicitor to continue to represent her notwithstanding the fact that the director of the First Respondent had briefly consulted that solicitor on a pro-bono basis having been served with the ET1. No instruction followed this meeting. The solicitor had forgotten the encounter, and was reminded of it only on the morning of the hearing, when the First Respondent's representative challenged him and asserted that the Claimant would have to find alternative representation. This was despite the First Respondent's director having known that the solicitor had been so acting for some months but he failed to draw it to the attention of his own representative until the day before the hearing. There was no basis for any suggestion that the Claimant's representative had obtained confidential information from the director which gave rise to prejudice.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this judgment I will refer to the parties as they were before the Employment Tribunal (the "ET"). This is an appeal by the Respondents against the decision of the ET, sitting at Norwich (Employment Judge Postle with lay members Mr Doyle and Mr Thompson) over three days in April 2018, written Reasons having been sent to the parties on 17 May 2018.

2. The ET held that the Claimant had been treated unfavourably as a result of her pregnancy; she was dismissed. It also held, as had been conceded, that holiday pay had not been paid to the Claimant. It also made an award of £478.36 in relation to a finding that the Claimant did not receive the National Minimum Wage. Other heads of claim were dismissed.

3. Certain aspects of the claim were not clear to me, from the written reasons, such as why the two Respondents had been treated for all purposes as one. However, having heard from Mr Watson on behalf of the Respondents, and Miss Reid, who has done an excellent job of representing herself, things have become clearer. The First and Second Respondents are separate legal entities. Each operates a separate franchise pizza business trading as Papa John's in two locations in Norwich. The First Respondent's establishment is in Plumstead Road and the Second Respondent's in Colman Road.

4. Paragraph two of the Reasons reads as follows:

> their evidence through prepared witness statements. The Tribunal also had the benefit of a bundle of documents consisting of 111 pages.
>
> **"2. The Tribunal heard evidence in this case from the claimant, from her mother Mrs Sarah Mason and from a former employee, Mr Tim Cleaver all giving their evidence through prepared witness statements. For the respondent we heard evidence from Mr Ricky Shaw the manager, Mr Zohaib Hassan an employee of the respondents, Miss Rachel Brewster another employee of the respondents, Miss Leanne Warrington**

another employee of the respondents, Mr Muhammad Usman Naeem the area manager of the respondents, and Mr Syead Anjum a director and shareholder of the respondents all giving"

5. I am told by Mr Watson, and it is not in dispute, that of the persons named in that paragraph, Mr Shaw, Hassan, and Ms Brewster worked for the First Respondent and Ms Warrington works for the Second Respondent. Mr Anton is a director and shareholder of the First Respondent but is neither a director nor a shareholder of the Second Respondent.

6. Paragraph 16 of the Reasons state as follows:

"**16. The remedy award in terms of the identity of the claimant's employer is to be a joint and several award, in other words the liability is jointly and severally against both the first and second respondent as it appears at various times the claimant was employed by both."**

7. The Employment Tribunal was excoriating about the evidence on behalf of the First Respondent finding that it had provided no contract of employment to the Claimant or anyone else and it commented, at paragraph 9, "The company records so far as they exist are frankly unhelpful and some of them the Tribunal do not hesitate to suggest are frankly fabricated." Mr Anton, a director and shareholder of the First Respondent had given evidence. He claimed that he was unaware of the Claimant's pregnancy even though the dismissal letter said that the dismissal was "…. nothing to do with you personally or any of your health circumstances" something the Tribunal found to have been a reference to the pregnancy. However, in the course of cross-examination, he said, "I did not dismiss her just because she was pregnant" something inevitably fatal to the defence of that aspect of the claim, as well as to his credibility.

8. The appeal has been allowed to progress to a full hearing on two grounds by His Honour David Richardson following a Preliminary Hearing. The first, Ground five, concerns the

finding by the Tribunal that each of the two named Respondents was jointly and severally liable for the award made, although it is said she was an employee of only one of them albeit occasionally being sent to work in a similar shop operated by the other. The second, Ground six, arises from the fact that the solicitor acting for the Claimant, Mr Dean, had seen Mr Anton at a free consultation he offered after the ET had been served but before the ET3. Mr Dean's services were not in fact taken up, the First Respondent engaging Peninsula to represent it. The point was raised for the first time when Mr Anton notified his representative, Ms Halsall on the day before the hearing. She raised it to the ET and subsequently reported the matter to the Solicitors Regulatory Authority which seems not to have been unduly concerned.

9. His Honour David Richardson having given leave for the two grounds to progress to this hearing made certain directions:

> **"The Employment Tribunal is requested to give its answer (within 42 days if practicable) to the following question. The answer must be given by reference to the ET's notes of evidence and without the need to adduce or allow the adduction of any further oral evidence.**
>
> **Please consider paragraph 12 of the ET reasons**
>
> **By virtue of what facts and reference to what legal reasoning, did the ET's notes reach the conclusion that the Claimant was employed by the Second Respondent, and from what date or dates to what or dates?**
>
> **Under paragraph 12 of the Employment Appeal Tribunal Practice Direction 2018 the Appellants and Ms Haisall must lodge with the Employment Appeal Tribunal and serve on the Respondent an affidavits setting out the facts relied on in support of ground 6 of the Notice of Appeal and in default Ground 6 of the Notice of Appeal be dismissed. Upon receipt by the Employment Appeal Tribunal of such affidavit(s)the Employment Judge and members of the relevant Employment Tribunal will be asked for their comments for purpose of the full hearing; and Respondent may if so advised lodge with the Employment Appeal Tribunal and serve on the Appellant an affidavit in response within 28 days of the seal date this order."**

10. He commented that it was reasonably arguable that there seemed to be little consideration on the issue of joint and several liability and that it was an unusual situation that Mr Dean was subject to a conflict of interest rendering the hearing unfair. He considered each point reasonably arguable, posing the question in relation to Ground six: "Can a solicitor,

having been consulted by one side in respect of a piece of litigation, then appear for the other side in respect of the same piece of litigation?"

11. Pursuant to those directions, Employment Judge Postle responded as follows in relation to ground five.

> **"The Employment Tribunal's Response**
>
> **The unanimous decision of the Employment Tribunal was on a number of occasions the claimant was sent to the Colman Road Shop in Norwich to work which was run as a separate company by the Second Respondents and therefore at various times and dates must have been employed by the Second Respondents. The Tribunal repeats its general reasoning, given the lack of any contract of employment for the Claimant and indeed any provided to any members of staff, the company records so far as they exists, were frankly unhelpful and the Tribunal repeats reference to paragraph 9 of its reasoning in the Judgment. It is therefore impossible given the lack of record keeping by either company to give dates."**

12. I propose to deal first with Ground six. In relation to this Ground, Ms Halsall wrote confirming that she had been told only the night before the hearing of Mr Anton's earlier conference with Mr Dean. She also provided a copy of an email she had written to the SRA on the day of the hearing itself. From these it is clear that Mr Anton had apparently thought it was okay for a solicitor to act in this way, although felt it unfair. On the morning of the hearing Mr Dean was confronted by Ms Halsall who asked him to arrange alternative representation for the Claimant. Mr Dean said that he did not recall Mr Anton but after making a phone call to his office confirmed that there was a record that he had spoken, although he still did not remember him. He pointed out that he did a good deal of pro bono work. The email to the SRA is useful as it provides a near contemporaneous account of the ET's ruling:

> **"They accept the view that the Claimant's solicitor does not remember. On balance, there is no prejudice to the Respondent. This matter has gone on for some time and there is a letter on file from 3 December 2017 which was sent to the Respondent themselves and their representatives as well as Gordon Dean solicitors. Furthermore, it is not the duty of the Tribunal to police the profession and therefore for these reasons they will allow the Tribunal to continue."**

The statement goes a little further, pointing out that the Employment Judge said that there would be no prejudice as any documents shown to Mr Dean would have been disclosed anyway.

13. Mr Anton's affidavit sets out what he said he told Mr Dean at the meeting and says, at paragraph 10, that when he found Mr Dean was representing the Claimant he was unhappy and felt that he was using the material he had shown him to prepare the Claimant's case against him. I find that unconvincing bearing in mind that he had been represented by Peninsula for some months and had not raised the point with them at any stage. At paragraph 11, Mr Anton asserts that his cross-examination by Mr Dean was different from that of other witnesses. He said that Mr Dean called him a liar to his face and asked questions as to aspects of the business which he did not deal with. He asserts, "He only asked me those questions because of what I told him when I met him." However, the generality of the earlier paragraphs of his affidavit does not disclose what, if anything, was provided to Mr Dean to enable those questions to be asked. It is also not apparent from the ET's reasons what possible questions they could have been. Ms Halsall supports the suggestion that the cross-examination was "harsher" than that of other witnesses.

14. The Employment Judge, and each of the members, have responded on this point. Employment Judge Postle set out the process undertaken, he and the members concluding there was no prejudice. Mr Doyle commented that given the brief nature of the interaction and the fact that the facts had not stuck in Mr Dean's mind there was no prejudice to Mr Dean remaining in the case. He said that he did not have any concerns as to the manner of cross-examination nor did he form the view that Mr Dean did not like Mr Anton. He said that the questioning was appropriate for a solicitor representing his client's interests. Mr Thompson

gave a briefer reply but confirmed that from his reading of Mr Anton's affidavit, nothing in it persuaded him that the earlier discussion with Mr Dean had given any advantage to the Claimant. I add, parenthetically, that the Employment Judge and each of the Lay Members recall distinctly the use by Mr Anton of the words "I did not dismiss her just because she was pregnant." Ms Halsall raised this in her statement for this appeal for reasons I am not sure of. However, it does not seem relevant to me to any issue under appeal.

15. Miss Reid has provided a lengthy statement. Without meaning any disrespect for her, it adds little to the material I have already mentioned. She has also used the occasion to re-argue points which are ostensibly in relation to Ground five. That was not the purpose of the direction to exchange evidence and, as I explained to her, I cannot take those matters into account, the EAT not having jurisdiction to re-hear findings of fact as found by the ET.

16. The professional conduct of solicitors is essentially one for the profession rather than for the courts. After reading the papers in this case, I asked the Respondent whether it intended to rely on authority in support of its stance. That resulted in a considerable number of cases being cited and hard copies being provided today; I shall mention just three: **Western Avenue Properties & Ors v Soni [2017] EWHC 2650 QB**; **Despatch Management Services UK Limited v TW Douglas [2001] UKEAT/902 2001**; and finally, **Bayche v Essex County Council [2000] EWCA Civ 3**. **Western Avenue** is authority for the proposition that in High Court litigation a solicitor who has previously acted for one party and has thereby obtained confidential information may be the subject of an injunction from acting against that party in subsequent litigation. **Bayche** held that an ET cannot prevent a Claimant from having his or her choice of representative even, it seems, where that representative had had confidential information from the other party. The EAT in **Despatch Management Services** went on to

consider the question whether there had indeed been confidential information revealed and concluded that there had not.

17. It would offend justice if a solicitor or indeed any representative who had been provided with privileged information or confidential instructions which were not disclosable made use of those materials and/or the information in them to gain an advantage in the litigation. However, in the light of authorities mentioned, I am wary on the facts of this case to trespass into too wide a discussion on the practical limits of a Tribunal's discretion where, as here: (i) a solicitor made clear that he had no recollection of a brief pro bono meeting with a representative of the first Respondent; (ii) he was not subsequently instructed by that client; and (iii) the Respondent is unable to point to any matter which is said to have been confidential and/or gave the Claimant an unfair advantage. I cannot see that any unfairness resulted. On the facts of this case, the game was up when Mr Anton made the extraordinary statement that he did. It is also relevant, as the ET held, that for this to be sprung on Mr Dean and the Claimant on the morning of the hearing when the First Respondent had known that Mr Dean had been acting for her for some months was surprising.

18. The Respondent argues that the irregularity was such that the decision should be quashed and there cannot now be a re-hearing. I find such a submission entirely unpersuasive and dismiss that ground.

19. Turning to Ground five, it seems to me that the Tribunal has clearly erred in law in holding both Respondents jointly and severally liable without seeking to explain precisely how an obligation arose on the part of the Second Respondent and why it was not possible to apportion the time during which the Claimant worked for each Respondent. However, as it has

always been the Respondent's case that the Claimant worked for it, and the dismissal letter was written by Mr Anton and sent by Mr Shaw, both of the First Respondent, there is only one possible answer to the question which of the Respondents was responsible for the dismissal, the subsequent injury to feelings and the agreed holiday pay. Thus, pursuant to **Jafri v Lincoln College [2014] EWCA Civ 449**, I direct that the sums found payable by both Respondents under this head, are payable solely by the First Respondent.

20. As to the smaller sum, under the minimum wage claim, it seems to me that that would require an apportionment following an enquiry. Therefore, there is no liability in relation to the Second Respondent whose appeal succeeds. The First Respondent's appeal fails for the reason which I have given.