Appeal No. UKEAT/0315/19/VP

EMPLOYMENT APPEAL TRIBUNAL

5th FLOOR, ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 10 November 2020

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

NGP UTILITIES LIMITED — APPELLANT

MS A DUNNINGTON — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR SIMON GOLDBERG (of Counsel) Instructed by: Ms Rebecca Fielding Square One Law Anson One Fleming Business Centre Burdon Terrance Newcastle upon Tyne NE23 3AE
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE

UNLAWFUL DEDUCTION FROM WAGES

The Employment Tribunal was wrong to refuse permission to the Respondent to rely on similar fact evidence in support of its contention that the Claimant mis-sold contracts and wrongly claimed commission on them. The effect of the evidence was that she had made dishonest commission claims in her previous and subsequently employment. The Employment Tribunal erred in:

(a) relying on the principle of finality in litigation, which was inapplicable;

(b) concluding that the overriding objective favoured excluding the evidence, when it did not; and

(c) not identifying a good reason for excluding relevant evidence.

THE HONOURABLE MR JUSTICE LAVENDER

1. This is an appeal by the Respondent against the order of the Employment Tribunal ("ET") sitting at North Shields and consisting of Employment Judge Garnon sitting alone, which was sent to the parties on 2 October 2019. By that order, the ET refused the Respondent's application for permission to adduce evidence from three witnesses at a hearing, which is to be held following the Respondent's successful application for reconsideration of an earlier decision.

2. The Claimant has not appeared and is not represented at the hearing of this appeal. She was disbarred from participating in the appeal by order made by the Registrar on 23 June 2020 as a result of her failure to respond to the appeal.

3. The context is that the Respondent is an energy broker. The Claimant, in the proceedings before the ET, claimed, amongst other things, unlawful deductions from wages in the form of unpaid commissions allegedly due to the Claimant as a result of her arranging energy supply contracts for certain of the Respondent's customers. Part of the Respondent's response to that claim was that the Claimant was not entitled to commission as she had been guilty of mis-selling the contracts in relation to which she claimed commission. The details of the mis-selling are not relevant for present purposes. The ET recorded in paragraph 4 of its judgment that the Respondent's case was that the Claimant was not entitled to the commission payments sought by reason of her deliberately submitting inflated consumption figures and/or knowingly selling or attempting to sell contracts based on false changes of tenancy in order to generate commission for her personal gain.

4. There was a hearing on 8 to 10 April 2019, at which the ET determined certain issues in the claim. It sent an order to the parties on 11 April 2019, in which it held that the terms of the Claimant's contract of employment entitled her to be paid some but not all of the commissions claimed. The ET gave oral reasons at the conclusion of the hearing. The Respondent requested written reasons and these were sent to the parties on 30 April 2019.

5. In reaching its judgment, the ET did not determine whether or not the Claimant was guilty of mis-selling contracts or, if so, what the effect of that would be upon her entitlement to commission upon the sale of those contracts. In its written reasons, the ET recorded a contention, which it mistakenly thought had been made by the Respondent's counsel, that it was entitled to withhold commissions irrespective of fault. The ET appears to have taken that as a concession and as an indication that it was not required to adjudicate upon the Respondent's case that the Claimant was not entitled to commission because she had been guilty of mis-selling the very contracts upon which she claimed commission.

6. The Respondent applied for reconsideration of the judgment on 24 April 2019. On 16 May 2019 the Respondent was contacted out of the blue by Steven Rawlingson, the Chief Executive Officer of Samuel Knight International, the company for whom the Claimant had gone to work after leaving the Respondent. Mr Rawlingson had told the Respondent that the Claimant had just been dismissed for gross misconduct after making false commission claims.

7. The Respondent's application for reconsideration was initially considered at a private preliminary hearing on 22 May 2019, at which, *inter alia,* the Respondent's counsel submitted that the Respondent was now in receipt of new evidence which showed that the Claimant had been guilty of dishonestly claiming commission in other roles.

8. The ET did not on that occasion determine the application for reconsideration, but instead directed that the application be considered at a further hearing and directed that the Respondent should file a reconstituted application, which included its new evidence. That reconstituted application for reconsideration was submitted on 10 June 2019. The new evidence at that stage consisted of a statement from Mr Rawlingson.

9. However, the application also indicated that the Respondent anticipated that it would soon be in receipt of further evidence of a similar nature from another witness. Enquires were being made of a company which the Claimant used to work before joining the Respondent, namely Utilitywise. As a result of those enquiries, on 23 July 2019 the Respondent sent the ET copies of witness statements from Gary Nolan, who had been the Claimant's team manager at Utilitywise, and Scott High, the Respondent's Global People Director. Mr Nolan said that the Claimant had left her employment with Utilitywise while being investigated for allegedly claiming commission to which she was not entitled and forging a customer's signature on a contract to support her claim for commission.

10. These three statements constituted the new evidence which the Respondent sought to rely on at the hearing of the reconsideration application.

11. The reconsideration application was heard on 30 July 2019. The Claimant did not attend and was not represented.

12. By a judgment sent to the parties on 15 August 2019, the ET found that it was in the interests of justice to reconsider its judgment of 10 April 2019, revoked that judgment and indicated that it would take its decision again. In the written reasons, which accompanied the

judgment, the ET accepted that it had misinterpreted what the Respondent's counsel had said at the April 2019 hearing and that the Respondent ought to be allowed to run its secondary argument, i.e. that the Claimant should not be entitled to commission because of her conduct in mis-selling.

13. The ET also found that the Respondent's application to admit new evidence had reasonable prospects of success and directed that it could be considered further once the Claimant had had an opportunity to comment upon it, which she did by filing objections on 29 August 2019, to which the Respondent responded on 18 September 2019. Thereafter, the ET determined the application for permission to rely on new evidence on the papers without a hearing. It refused the application, as I have said.

14. In identifying the new evidence, the ET said as follows in paragraph 12 of its judgment:

> **"If accepted they tend to show the Claimant had been dishonest in the claiming of commissions in employment she obtained subsequent to her dismissal, not in the field of energy brokerage but in a recruitment business arranging contracts between prospective employers and employees."**

15. The ET then set out its reasons for refusing to admit the evidence in paragraphs 13 to 16 of its judgment. It structured its reasoning by reference to the five numbered points which the Claimant had advanced in her written submissions. The ET rejected the first, third and fifth of those points, about which I need say no more. The second and fourth points were as follows:

> **"(2) There should be finalities in litigation and allowing the new evidence would not be in accordance with the overriding objective."**
>
> **"(4) It will not have an important influence on the hearing in that it falls to relate to matters outside the Claimant's employment with the Respondent."**

16. In paragraph 14 of its judgment, the ET said that,

> **"The Respondent relies on O'Brien v Chief Constable of South Wales Police [2005] 2 AC 534 and Desmond v Bower [2009] EWCA Civ 667 to show evidence of what had a person has done in the past and after the event is potentially relevant. In theory, I agree."**

17. It is not entirely clear what the Tribunal meant by the words, "In theory, I agree." I have already cited what the Tribunal said in paragraph 12 of its judgment that the evidence, in particular, of Mr Rawlingson would establish if it were accepted. That evidence, if it were accepted, would undoubtedly tend to support the Respondent's case on the matters at issue in this case.

18. The ET then set out is Reasons in paragraph 15s and 16 of its judgment. In paragraph 15, it stated as follows:

> **"I view the decisive factors as a combination of point 2 and 4. I wrote in July, if it is in the interests of justice to admit this further evidence, it could add a day or two to the resumed Hearing but I do not view that as a relevant consideration to whether it should be admitted. That overstates the position upon reflection. Delay and expense are relevant under the overriding objective but of relatively minor importance compared to a proper consideration of the real issues. It is the Respondent's task to prove what it asserts that the Claimant must have known, [would assert that the Claimant must have known?] all or some of the contracts 16 to 21 with the ones the supply company would lawfully have the right to rescind when the full truth came to light. Unlike life insurance contracts, these are not contracts in which the customer is obliged to make full disclosure of all matters which may be relevant to the energy supply company's decision whether to enter into a contract. However, half-truths mainly misrepresentations if the facts withheld make positive assertions untrue."**

19. I note that it is clear from the first sentence of that paragraph that the ET relied in part on the Claimant's point 2, i.e., that there should be finality in litigation and that allowing the new evidence would not be in accordance with the overriding objective. However, the Tribunal did not elaborate further on point 2.

20. At paragraph 16 of its judgment, the ET said that:

> **"What might have happened before or after the Claimant's employment with the Respondent will not show what the Claimant represented to supply companies or what she knew or [altered now?] on those occasions. In oral evidence Miss Barrett said the contracts in respect of [Blue Harbour Ltd and Stanley Dock Hotel Ltd?] were ones [no experience BAM?] [inaudible] failed to realise would be likely to be rescinded by the supply company when they discovered the full facts. Hence, the Respondent says, what is alleged in paragraphs 9b and c the letter of 24 April can be established. It is never possible to prove with certainty what was in someone's mind.**

> **The Tribunals are well used to finding on balance of probability the reason why people acted as they did and what they knew based upon what people in their experience would know. If the Respondent shows primary facts in the resumed Hearing to show what Miss Barrett asserted is indeed the case, I will be able to draw the inference the Claimant must have known what she was doing was wrong and likely to lead to the commission paid to the Respondent having to be paid back on the rescission of the contracts. The new evidence will take the focus away from the need to establish primary fact in relation to those contracts. A [inaudible] is no substitute and confuse witnesses, representatives and myself as to the points which really matter."**

21. Six grounds of appeal have been put forward, but Mr Goldberg accepts that they feed into each other and he did not seek to make discrete submissions in relation to each ground. He acknowledged at the outset of his submissions in writing that:

> **"In determining the application to rely upon the new evidence, the ET was exercising case management powers under Rule 29 of the ETs Rules of Procedure 2013. The Employment Appeal Tribunal will not interfere with a Case Management Order unless an ET's approach discloses as error of law, and in the context of discretionary Decisions such as case management, an error of law requires the ET to have failed to take a relevant factor into account, taken an irrelevant factor into account, or reached a Decision no ET could properly have reached."**

22. Mr Goldberg submitted that on analysis the ET did not take relevant factors into account, took irrelevant factors into account and reached a case management decision which no ET could properly have reached. In developing those submissions, he emphasised three aspects of the context in which the ET made its decision.

23. First, by the time the ET came to decide whether to admit the new evidence, it had already revoked its decision that the Claimant was entitled to commission and had already decided that it would reconsider that issue at a further hearing. Secondly, the ET acknowledged that it had not dealt with at April 2019 hearing with either of the following issues due to its misinterpretation of the Respondent's position: (1) whether the Claimant had mis-sold the contracts in respect of which she claimed commission; and (2) if so, what, if any, effect such conduct had upon her entitlement to commission. Thirdly, the new evidence was relevant to the first of those issues.

24. Mr Goldberg submitted that the principle that there should be finality in litigation could only have been relevant, if at all, at the stage when the ET was considering whether to revoke its

original decision. Once the decision to revoke was made, the litigation was going to continue and the only question for the ET was whether the Respondent should be limited in the evidence it could call at the further hearing.

25. As for the overriding objective, Mr Goldberg submitted that the ET did not identify in what respect permitting the Respondent to rely upon the new evidence would offend against the overriding objective. On the contrary, he noted that the ET found in paragraph 15 of its Judgment that the additional time and cost of admitting the new evidence was of marginal relevance. Therefore, it does not appear that avoiding delay, saving expense or proportionality concerns were part of the ET's reasoning, something which Mr Goldberg submitted was not surprising in a claim pleaded as being worth £450,000.

26. He further submitted that it would have been consistent with the overriding objective of ensuring the parties were on an equal footing to permit the Respondent to rely on the new evidence, on the basis that parties are not on an equal footing if one party is prevented from calling potentially relevant evidence and the other party is not. Therefore, his submission is that, looking at the overriding objective overall and properly, the balance fell down in favour of admitting the new evidence.

27. As to paragraph 16 of the judgment, Mr Goldberg submitted that there was an internal inconsistency in the ET's reasoning. At paragraph 14 of its judgment, the ET accepted the Respondent's submission that evidence of a person's conduct before and after the events in question might be relevant to the ET's consideration of whether the Claimant was guilty of the conduct alleged by the Respondent, i.e., the mis-selling of energy contracts. That is, or ought to be, he submitted, an uncontroversial proposition.

28. However, at paragraph 16 of the judgment, the ET appears to have turned its face against that principle and held that it would not be assisted by the new evidence and that instead it would be a distraction. Mr Goldberg submitted that it was important to bear in mind that at the stage of determining the Respondent's application for permission to adduce new evidence, the ET was only concerned with the issue of admissibility of the new evidence. It was not concerned with the issue of the weight to be attached to the new evidence, which would be a matter for the ET to consider at the further hearing.

29. In his submission, the ET appeared to have lost sight of this important distinction. On any view, the new evidence was admissible. It was relevant to the issue of whether the Claimant was guilty of mis-selling and her state of mind when doing so and then claiming commissions on the mis-sold contracts.

30. As to the final sentence of paragraph 16 of the judgment and the ET statement that, "There was a danger of witnesses, representatives and the Employment Judge himself being distracted by the new evidence," Mr Goldberg submitted that it was difficult to see how this could possibly be a good reason for excluding the new evidence, since; (a) the parties were professionally represented and the representatives could be expected to understand the relevance of the new evidence to the issues in the case; (b) in any event, the Employment Judge would be able to control the proceedings in the further hearing, so that in the unlikely event that the representatives and witnesses were distracted by the new evidence, he could refocus their attention; and (c) most fundamentally, the only person it was important was not distracted by the new evidence was the Employment Judge himself, i.e., the decision-maker. He was an experienced judge who had shown in his previous judgment that he appreciated the potential limitations of the new evidence.

A

31. I agree with the submission that the ET took account of an irrelevant consideration when it relied on the principle of finality in litigation. The admission of the new evidence would not offend against that principle since there was to be a reconsideration hearing in any event. For that reason alone, the ET's decision involved an error of law.

B

32. However, I also agree that the ET was wrong to rely on the overriding objective as a reason for refusing permission to rely on the new evidence. I accept Mr Goldberg's submission that the admission of the new evidence will not offend against any part of the overriding objective and, indeed, is arguably supported by it.

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33. Mr Goldberg helpfully referred me to the discussion on the admission of similar fact evidence in Lord Bingham's judgment on **O'Brien v Chief Constable South Wales Police**. In that case, the House of Lords held that similar fact evidence is admissible if it relevant, i.e., potentially probative of an issue in the case. There can be no doubt that the new evidence in this case meets that test. The ET's decision had the effect therefore of excluding admissible evidence.

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34. Pursuant to Rule 41 of the **Employment Tribunals Rules of Procedure 2013**, the ET was not bound of by the rules of law relating to the admissibility of evidence in proceedings before the Courts. Therefore, Mr Goldberg conceded, quite rightly, that the ET had power to exclude this evidence, but, in my judgement, it remains a relevant consideration that it was excluding relevant and admissible evidence. The power to exclude relevant and admissible evidence is one to be exercised sparingly and only for good reason, a phrase used by Lord Bingham in paragraph 4 of his judgment.

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35. In my judgment, paragraph 16 of the ET's judgment did not provide good reason for excluding this relevant evidence. The first sentence of paragraph 16 merely states, in effect, that, being similar fact evidence, the new evidence was not direct evidence of the matters in issue in this claim. That, however, can be said of any similar fact evidence.

36. If and insofar as the ET was seeking to say that this new evidence would not have significant probative value at the hearing, that is difficult to square with its recognition in paragraph 12 of its judgment that the new evidence tended to show that the Claimant had been dishonest in the claiming of commissions in employment. Dishonesty in the claiming of commissions in employment is the very point in issue in this case.

37. The remainder of paragraph 16 develops the point that the new evidence is similar fact evidence rather than direct evidence on the issues in the case. In addition, one then comes to the final sentence of paragraph 16, which raises the issue of potential for distraction and confusion, something which can be relevant when considering whether or not to admit similar fact evidence, as was recognised, for instance, by Lord Bingham in paragraph 6 of his Judgment in **O'Brien**.

38. In relation, however, to the last sentence of paragraph 16 of the judgment, I note that when sifting this case, His Honour Judge Barklem went so far as to say that he had re-read the last sentence of paragraph 16 several times and did not understand what was meant by it, nor how it could be squared with other findings. There may be cases where relevant similar fact evidence would occupy a disproportionate amount of time at the hearing, but this was not such a case as the ET acknowledged in paragraph 15 of its judgment.

39. As to the potential for distraction and confusion, paragraph 16 itself illustrates that the ET had very clearly in mind the distinction between direct evidence on the matters in issue in the claim and similar fact evidence relating to other matters. Like HHJ Barklem, I do not understand how it can be said that admitting the similar fact evidence could cause the ET to become confused about that distinction.

40. I note that in paragraph 6 of his judgment in **O'Brien**, Lord Bingham pointed out that the potential for distracting the attention of the decision-maker, while it is a relevant factor in considering whether or not to admit similar fact evidence, is a factor of particular relevance where the trial is by jury. In this case, the hearing was to be conducted by the Employment Judge alone.

41. Accordingly, I have come to the conclusion that there was no good reason to exclude the new evidence and that its exclusion involved an error of law on that account as well by the ET I allow this appeal. I set aside paragraph 1 of the Order of the ET sent to the parties on 2 October 2018. I make an Order permitting the Respondent to adduce the witness statements of Mr Rawlingson, Mr High, and Mr Nolan at the further Hearing of the claim. I do so on the basis that the issue of whether the Respondent should be permitted to rely upon this evidence is one to which there is only one correct answer and, in any event, I am in as a good position as the ET would be to determine the issue. In addition, it will be disproportionate in terms of costs and delay to require the decision to be remade by the ET.