Appeal No. UKEAT/0033/20/DA (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 February 2021
Judgment handed down on
12 February 2021

Before

THE HONOURABLE MR JUSTICE BOURNE

(SITTING ALONE)

MR ROBERTO LEVY — APPELLANT

34 & CO LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR JAMES TAYLOR Free Representation Unit 5th Floor Kingsbourne House 229-231 High Holborn London WC1V 7DA
For the Respondent	MR ODIL RAUPOV (The Respondent in person)

SUMMARY

PRACTICE AND PRCOEDURE, CONTRACT OF EMPLOYMENT AND UNLAWFUL DEDUCTION WAGES

An Employment Tribunal did not err by not considering an uplift under section 38 of the Employment Act 2002 when making an award for an unlawful deduction from wages, where the Respondent did not have notice of the application and where the facts, on further investigation, would not have justified the uplift.

The Honourable Mr Justice Bourne

Introduction

1. This is an appeal against a decision by EJ Mason on 23 July 2019. The EJ declared that the Respondent had made an unlawful deduction from the Appellant's wages and ordered that the Respondent pay him the sum of £148.62. However, she did not increase this award under section 38 of the **Employment Act 2002** ("EA"). By this appeal the Appellant contends that she should have done so.

2. As I will explain, the effect of section 38 is to require or permit an ET to add an extra sum (which I will call an "uplift") to an award for unlawful deductions, in circumstances including a failure by an employer to comply with the statutory requirement to provide employees with written particulars of their employment.

3. The procedural history of this case has been unfortunate in a number of ways, as I will now explain.

4. The Appellant was employed by the Respondent as a Chef de Partie in a restaurant from 29 October 2018. He soon became dissatisfied with the job, and it is now known that he resigned with immediate effect on 27 November 2018. So, on any view, he was employed for less than one month.

5. He brought an ET claim for unlawful deductions from his wages. His claim form ET1 clearly stated that this was his claim, and also alleged that he had not been given proper payslips. It did not refer to any other type of claim.

6. The Respondent put in a response form ET3, disputing the claim on the basis that it had made correct deductions for taxes and that these were shown on a form P45.

7. However, the Respondent played no further part in the litigation and did not take legal advice. I have been told that this was because taking legal advice did not make economic sense, given the size of the claim in which the Appellant in fact recovered only £148. Although taking a passive attitude to legal proceedings may be unwise and unhelpful, the economic point made is an understandable one.

8. The Appellant obtained the assistance of Mr Taylor of the FRU, who represented him at the ET and has represented him today.

9. On 19 July 2019, a few days before the hearing, Mr Taylor made a written application on his behalf to amend his claim by adding a new cause of action "for failure to provide payslips". In the application, Mr Taylor pointed out that the omission to provide proper payslips was mentioned in the ET1. Nevertheless the application was made in case the ET took the view that the reference in the ET1 was not sufficient to launch a claim for a failure to provide payslips.

10. There was no such application to add a claim for an uplift under section 38 of the EA 2002. If it was intended to make such a claim, this omission is surprising, given that a claim for an uplift was not mentioned in the form ET1 whereas the absence of payslips had been mentioned there.

11. On 22 July 2019, the day before the hearing, Mr Taylor drew up a schedule of loss as at that date. He has shown me the schedule, and tells me that it was sent and shown to the ET. Unfortunately it was not provided to the Respondent.

12. The schedule of loss set out the calculation of an unlawful deduction of £148.62, the sum which the EJ would award in due course. Then, under the heading Written particulars of employment, it said:

> **"The Respondent has failed to provide written particulars of employment in breach of the Claimant's right pursuant to s.1 ERA 1996, Part II.**
>
> **The Tribunal should make an award to the Claimant of the higher amount of four weeks' pay, pursuant to s.38(3) and s.38(4)(b) Employment Act 2002. This amounts to £1,150 approx., based on the Claimant's worked hours of a four-week period.**
>
> **Total loss 1,150."**

13. This was the first, and indeed the last, articulation of a claim to the ET for an uplift. As I have said, it was not mentioned in the ET1 or notified to the Respondent. Nor was it mentioned in the Appellant's draft witness statement for the ET hearing.

14. At the hearing on 23 July 2019, the Respondent did not appear and was not represented. The Appellant was represented by Mr Taylor as I have said, and he gave oral evidence in which he adopted the contents of his unsigned witness statement.

15. Mr Taylor tells me that, at the hearing, he orally raised the Respondent's failures to provide (1) particulars of the Appellant's employment and (2) valid payslips, but there may have been some confusion so that the EJ did not appreciate that the lack of employment particulars gave rise to a discrete claim for a section 38 uplift.

16. The EJ announced her decision at the end of the hearing, making an award for an unlawful deduction of £148.62 and a declaration that there had been a failure to provide payslips. She said nothing about the section 38 uplift. Nor did she refer to the amendment application, although the declaration as to payslips shows that she found that claim to be valid.

17. The EJ elected to give written reasons because the Respondent had not appeared at the hearing.

18. Paragraph 1 of those reasons states that the Appellant "was employed by the Respodent as a Chef de Partie from 29 October 2018. His last working day was 25 November 2018." Paragraph 12 then states: "The Claimant was employed by the Respondent as a Chef de Partie from 29 October to 28 November 2018." That reflects the Appellant's draft witness statement in which he said that he had left on 28 November 2018.

19. The termination date does not appear to have been relevant to the substance of the claims for unlawful deductions and omission to provide payslips. However, it may have been relevant to the time limit for bringing the payslips claim, which is normally 3 months from termination of employment. The EJ's reasons recorded that the Appellant began the Early Conciliation process on 27 February 2019.

20. Mr Taylor did not challenge the omission of any section 38 uplift when the EJ announced her decision. Had he done so, then presumably the EJ would either have dealt with that claim or given reasons for not dealing with it.

21. The Appellant's Notice of Appeal is dated 29 August 2019. On 10 December 2019, Lewis J directed that it should proceed to a full hearing. On 2 March 2020 the EAT issued an order requiring, among other things, an Answer from the Respondent by 30 March 2020 and the compiling of an agreed bundle.

22. The Respondent did not respond at that time. The appeal was listed for hearing. The EAT sent out a listing letter and, on 7 January 2021, Mr Raupov responded on the Respondent's behalf by email. Referring to Covid restrictions, he said (with typos as in the original):

> **"As you may know restaurant businesses are now closed and there isn't anyone in employment to participate in this meeting. So we wont be participating.**
>
> **However we would like to make a note for the judges consideration.**
>
> **'Mr Levy was in employment for less than 1 month (29.10-26.11.2018) Employment rights act 1996 section 1(2), Section 2(6) and Section 198. These are the statutory provisions were in force at that time.**
>
> **Therefore he is not entitle to receive a statement of particulars of employment.**
>
> **Also please see attached text message from Mr Levy to terminate his employment himself with our head chef David Reyes on the 27th of November 2017 instead of showing up to work."**

23. Mr Raupov attached a screenshot of a series of WhatsApp messages sent by the Appellant to the Respondent on 27 November 2018. The key words in these messages are:

> **"I am leaving [the restaurant] for the reasons we talked about … Since it is less than a month of work there is no statutory notice to give".**

24. Mr Taylor realistically concedes that this evidence shows that the EJ was wrong about the dates of the Appellant's employment, and that in fact he resigned without notice on 27 November 2018. He was therefore employed for less than one month. As I will explain, one month's employment was a necessary precondition for any section 38 uplift.

25. However, Mr Taylor submits that it is too late for the Respondent to rely on this evidence, that the EJ's finding of fact as to the dates of employment must stand and, that on the basis of that finding, the EJ was bound to award a section 38 uplift.

The law

26. Sections 13 and 23 of the **Employment Rights Act 1996** ("ERA") gave the Appellant a right to complain to the ET that his employer had made an unauthorised deduction from his wages. Section 23(2) required such claim to be made within 3 months of the payment from which the deduction was made.

27. Sections 8 and 11 of the ERA gave the Appellant a right to complain to the ET that his employer had failed to provide itemised statements of his pay ("payslips"). Section 11(4)(a) required such claim to be made within 3 months of the termination of the relevant employment.

28. The statutory provisions relating to particulars of employment have been amended since the dates with which this case was concerned, but the old provisions are applicable to this case and are referred to below.

29. Section 1 of the ERA at the material time required an employer to give an employee a written statement of particulars of employment not later than 2 months after the start of the employment, and by section 2(6) the employer was required to do so even if the employment ended within that 2 month period.

30. However, section 198 of the **1996 Act** (pre-amendment) disapplied section 1 if the employee's employment "continues for less than one month". That is why this appeal depends on the Appellant having been employed for at least one month.

31. The necessary "particulars" of the terms of employment were enumerated in section 1. It appears to be common ground that no sufficient particulars were provided in the present case. I have been shown a "starter form" which the Appellant was given, but it omitted several of the necessary particulars.

32. The material provisions of section 38 of the **Employment Act 2002** state:

> **"(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.**
> **…**
>
> **(3) If in the case of proceedings to which this section applies—**
>
> **(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and**
>
> **(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …,**
>
> **the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.**
>
> **(4) In subsections (2) and (3)—**
> **(a) references to the minimum amount are to an amount equal to two weeks' pay, and**
> **(b) references to the higher amount are to an amount equal to four weeks' pay.**
>
> **(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."**

33. By virtue of schedule 5 to the **2002 Act,** section 38 applies to claims for unauthorised deductions under section 23 of the ERA 1996.

Discussion

34. There was a failure to provide employment particulars, and the Respondent remained in breach of section 1 of ERA on the date on which the ET claim was commenced. The Appellant made a valid claim for unlawful deductions.

35. It follows that the requirements for a section 38 uplift were satisfied if the Appellant was employed for at least one month.

36. The EJ found that he was employed from 29 October 2018 to 28 November 2018. The Appellant says that this satisfies the one month requirement. In my view that is probably correct, though it is not beyond argument. By section 210 of ERA and/or section 5 and schedule 1 of the Interpretation Act 1978, a month means a calendar month. In many contexts, a calendar month runs from a numbered date until the correspondingly numbered date in the following month: see **Dodds v Walker [1981] 2 All ER 609 at 610 per Lord Diplock**. However, in the employment context, one year's employment begins on the first day and ends on the 365th day of the given period (if it does not span a leap year), so if it began on 29 October 2018 it would end on 28 October 2019: see **Pacitti Jones v O'Brien [2005] IRLR 888**. If a calendar month is measured in that way, then on the EJ's finding there was one month's employment.

37. On the basis of that finding, Mr Taylor submits that the Tribunal was bound in law to apply section 38, which states that an uplift "must" be applied (subject to the residual discretion in exceptional circumstances).

38. However, I do not accept that the ET is bound to order a section 38 uplift whether or not it is asked to do so. In my judgment it is primarily for a Claimant to make known to the ET what

he is claiming. That ensures that the nature of the claim will be made known to the Respondent, and only then can there be a fair hearing.

39. I draw support for that view from the decision of Wilkie J in this Tribunal in **Stanbridge v Brookes (UKEAT/0032/14/BA, 27 June 2014**). In that case the claimant had a good claim for unlawful deductions. She had in fact been employed for less than one month. She had also not been provided with particulars of employment. Like the Appellant, however, she had not raised this in her claim form. In that case, like this one, the respondent did not take part in the ET hearing. Instead, the respondent made some written representations about the unlawful deductions claim. In that case, by contrast with this one, the ET of its own motion raised the question of failure to provide employment particulars and, wrongly thinking that section 38 applied to the situation, ordered an uplift. The respondent raised the requirement for one month's employment by way of appeal.

40. Wilkie J said:

> **"25. … As Mr Stanbridge pointed out in his Grounds of Appeal, the obligation on the employer to provide a written statement of particulars of employment within two months after the beginning of employment, provided for by section 1 of the Employment Rights Act 1996, is, by section 198 of that Act, disapplied to an employee if his employment continues for less than one month. It is common ground that Mrs Brookes' employment with Exact Vending Services did not last a month. It lasted from 19 February until 1 March. Accordingly, the Employment Tribunal did not have any jurisdiction to make a finding that there was a breach by Mr Stanbridge of his obligation under section 1 or to make any award in respect of such breach. It is particularly unfortunate that this Employment Tribunal took it upon itself to adjudicate a claim that Mrs Brookes had never made in her ET1, particularly where it was doing so at a hearing when Mr Stanbridge was not present, where he had applied for an adjournment which had been refused, and where the claim, on which they were adjudicating, was one of which he had no notice, because it had not been made by the then Claimant in the Employment Tribunal.**
>
> **26. Furthermore, although, in his request for a review, Mr Stanbridge did not identify the real difficulty in law with the decision made by the Tribunal, because he did not refer to section 198 of the Employment Rights Act 1996, where the Tribunal was acting of its own motion it was particularly incumbent on it to be astute to any defences that there might be in statute to such a claim which they were taking on themselves to adjudicate. Accordingly, in my judgment, the mere fact that Mr Stanbridge only raised this issue in law for the first time in his Grounds of Appeal does not preclude him relying upon it because it is a ground which goes to the jurisdiction of the Tribunal to make the award which it did. It is perfectly clear that the Tribunal, in the particular circumstances of this case, did not have any jurisdiction to make**

that award and, accordingly, Mr Stanbridge's appeal in respect of the award of £692.30 for breach of the obligation to provide a statement of terms and conditions of employment, section 1 of the ERA, succeeds and that part of the award will be quashed."

41. In **Stanbridge,** the Tribunal did broadly what the Appellant contends it should have done in the present case, i.e. it considered section 38 of its own motion and, because the respondent was not present, it did so without notice to the respondent.

42. Wilkie J ruled that the one-month point deprived the ET of jurisdiction to apply section 38, but he also described it as "unfortunate" that this occurred without proper notice to the other side, and he ruled that a tribunal in such circumstances must be "astute" to any possible defences.

43. The present case is not identical. Section 38 was apparently raised in the Appellant's schedule of loss. Nevertheless, the common feature is that the Respondent had no notice of the uplift claim. If the EJ had considered that claim, she would have been bound to consider carefully whether there was any defence to it. She would have been bound to observe that the termination date (which had not been relevant to the deductions claim) only just passed the one month threshold, and arguably at that. In my view she would have been bound to consider carefully the evidence about the termination date, not least because on the findings that she did make, the Appellant did not actually have any work at the restaurant after 25 November 2018 (a date which perhaps should have been 26 November on the basis of rota sheets which I have been shown). If she had asked how termination occurred, she would presumably have been told that the Appellant resigned by sending one or more WhatsApp messages. Those were disclosable documents, and should already have been disclosed by the Appellant (because they were relevant to the time limit for the payslips claim, and because they were relevant to the section 38 claim which was mentioned in the schedule of loss). Moreover, I cannot see how the EJ could have fairly decided the section 38 issue without giving notice of it to the Respondent. A claim for a further £1,150

might well have persuaded the Respondent to request an adjournment, which in those circumstances could hardly have been refused. Any further inquiry might well have uncovered the WhatsApp messages, and that would have been the end of the section 38 claim.

44. In those circumstances the Appellant is wrong to contend that the EJ erred in law by not making a section 38 award. On the contrary, if she had made the award on 23 July 2019 she would have erred in law. At most, she could have given notice of the issue to the Respondent and subsequently investigated it further.

45. That is sufficient to dispose of this appeal. Nevertheless, I will comment on another issue which was raised.

46. Mr Taylor contends that the Respondent cannot rely on the WhatsApp messages upon this appeal because it cannot satisfy the requirements set out in the Practice Direction (EAT – Procedure) 2018:

> **"9.3 In exercising its discretion to admit any fresh evidence, the EAT will only admit the evidence (in accordance with the principles set out in Ladd v Marshall [1954] 1WLR 1489 and having regard to the overriding objective), if all of the following apply:**
> **9.3.1 the evidence could not have been obtained with reasonable diligence for use at the Employment Tribunal hearing; and**
> **9.3.2 it is relevant and would probably have had an important influence on the hearing; and**
> **9.3.3 it is apparently credible."**

47. The Practice Direction also requires a party seeking to rely on such evidence to make an application explaining how the evidence came to light. It also provides that the EAT usually will not consider such evidence unless and until there has first been an application to the ET to reconsider its decision.

48. In this case the Respondent has made things difficult for itself. It did not attend the ET hearing. It then did not file an Answer to the appeal. Only about 3 weeks before the hearing was there a discussion between staff which led to the discovery of the WhatsApp messages.

49. Having said that, I do not think the Respondent could have been expected to address the termination date at the ET hearing, because it did not appear to have more than peripheral relevance to the claim. The Respondent was not on notice of the section 38 claim.

50. The failure to respond to the appeal was more unfortunate, although an omission to take legal advice was understandable (as I have said) because of the small sums involved. Legal advice might have prompted a reconsideration application to the ET. However, in applying the overriding objective and dealing with this small claim in a proportionate way, I do not think it would be right for the EAT now to insist that the termination date be reconsidered (out of time) by the ET. And, if I did impose that requirement on the Respondent, I would think it fair to impose the same requirement on the Appellant, who could also have raised the section 38 question by a request for reconsideration.

51. I have therefore had regard to the WhatsApp messages, which appear to demonstrate that the section 38 claim had no merit at all. Nevertheless, my decision is not based on that evidence. It is based on the lack of any error of law by the EJ, as I have explained.

52. Finally I note that even if I am wrong, and the EJ erred by not dealing with the section 38 issue, the final outcome would almost certainly have been the same. The Respondent would have been put on notice and/or the termination date would have been investigated further. The true termination date would have emerged. The EJ would have discovered either that she did not, in

fact, have jurisdiction to award any uplift under section 38, or that there were unanswerable grounds for exercising her discretion not to award an uplift.

Conclusion

53. For these reasons the appeal is dismissed.