Neutral Citation Number: [2022] EAT 88

Case No: EA-2020-000893-DA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 January 2022

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

MS N BROOKS	**Appellant**
- and -	
MS M PLETENI & ORS	**Respondents**

- -
- -

Ms L Seymour (instructed by Kingsley Napley LLP) for the **Appellant**
No representation for, or attendance by Respondent having been debarred from the proceedings

Hearing date: 27 January 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, CONTRACT OF EMPLOYMENT, UNLAWFUL DEDUCTION OF WAGES, VICTIMISATION & HARASSMENT

The ET erred in allowing an amendment of a claim to allege that a respondent was the claimant's employer, and in proceeding with the final hearing and finding that that respondent was the employer and was liable for unauthorised deductions, harassment and victimisation, where the respondent did not attend either hearing and had not had notice of the amendment and where the evidence provided an insufficient basis for the finding.

THE HONOURABLE MR JUSTICE BOURNE:

1. **Introduction**

This appeal arises from a claim by the claimant, Margarita Pletini. The claimant worked as a waitress at premises known as the Wellington Club in London from early September 2019 until 18 October 2019. On 24 December 2019 she brought ET proceedings for (1) sex discrimination, sex harassment and victimisation and unlawful deductions from wages against Asser Ltd and the Wellington Club; (2) a claim for victimisation against the appellant, Nicola Brooks; and (3) a claim for sex harassment against Phil Drummond.

2. The appellant received the ET1 claim form and filed an ET3 response. She denied the victimisation claim, giving an account of the relevant events which differed substantially from what the claimant had alleged.

3. At a preliminary hearing on 6 May 2020 the claimant was permitted to amend her claim to add as a fifth respondent "Ms Nicola Brooks T/A The Wellington Club". As second respondent, she was permitted to substitute "Mr Jake Panayiotou T/A The Wellington Club". This was on the basis of her contention that the appellant and Mr Panayiotou formed the club as a partnership, were the claimant's employers and therefore were liable for all of the claims mentioned above. Although the appellant was already a third respondent to the claim, this was not in the capacity of alleged employer.

4. None of the respondents to the claim attended that PH or another one on 22 June 2020 or the final hearing on 22 and 23 September 2020.

5. Having heard evidence at the final hearing, Employment Judge Brown decided that the appellant in an individual capacity was trading as the Wellington Club and was the claimant's employer. She made findings of unlawful deductions totalling £320 and of sex harassment and victimisation, awarding compensation of £12,000 for injury to feelings plus interest of £891.80

and £1,680 for loss of earnings plus interest of £54.71. The appellant was liable for all of these sums, and the fourth respondent was jointly and severally liable for the lost earnings and for £3,000 of the award for injury to feelings plus interest.

6. The appellant advanced several grounds of appeal. Those which have been permitted to go forward to a final hearing are: (1) the EJ erred in law in proceeding with the final hearing on 22 September 2020, when the appellant was not aware of the hearing or of the fact that she had been added as fifth respondent in the capacity of employer; (2) the EJ erred in law at the PH on 6 May 2020 by permitting the claim to be amended, adding the appellant as fifth respondent in the capacity of employer and by directing all of the claimant's claims against her employer against her as the new fifth respondent; and (3) the EJ erred in law at the final hearing on 22 and 23 September 2020 in deciding that the appellant was the claimant's employer.

7. On 27 October 2020 the appellant applied for reconsideration. In a witness statement accompanying that application, she said that when she received the claim in January 2020 and filed an ET3 response in February 2020, she gave as her address the club's address in Jermyn Street, because she "perceived this as a work-related issue" and because she did not generally give out her personal contact details. In late March 2020 the club closed because of the Covid pandemic. In May 2020 she left the UK, moving to Croatia for family reasons. Between May and October 2020 she was able to check for mail received at her former residential address in London, but she received nothing from the tribunal. She heard nothing more about the case until 14 October 2020 when Mr Drummond telephoned her and said that the press had contacted him about the judgment. She realised that the claim had been amended, heard and decided against her, and she instructed solicitors. Meanwhile, she was not and never had been the owner of the club or the claimant's employer. The club, she said, was owned by a company called Bliss Hospitality Ltd. In support of that contention, she exhibited a number of invoices from suppliers to that company relating to the club during the relevant period. The appellant also

denied what the claimant had said about the appellant's treatment of her, giving a very different version of events.

8. Employment Judge Brown refused the reconsideration application on 24 May 2021. The refusal letter states:

> "Dear Sir / Madam,
>
> Employment Judge Brown has asked me to write as follows:
>
> The Third/Fifth Respondent's application for reconsideration of the judgment is refused; there is no reasonable prospect of the decision being revoked or varied.
>
> As set out in the Tribunal's Preliminary Hearing Records of 6 May 2020 and 22 June 2020 and in the Tribunal's judgment, Ms Brooks was aware of the proceedings and had served a Response to them. She was aware of the hearing on 6 May 2020, but failed to attend, having made no effort to contact the Tribunal or the Claimant's solicitors, whose details were on the claim form.
>
> Ms Brooks ought also to have been aware of the Final Hearing, as the Notice of Claim which accompanied the Claim Form when it was sent to the parties - and gave the date by which Ms Brooks' Response needed to be submitted - also specified the Final Hearing dates and gave directions for preparation for that Final Hearing. Nevertheless, Ms Brooks did not attend the Final Hearing, which was in person at Central London Tribunal, as had been set out in the Notice of Claim.
>
> As recorded in the TPHC records, the Claimant's solicitors had made efforts to trace the addresses of the Respondents in this case, including the email address of the Fourth Respondent, Mr Drummond. The Tribunal sent all correspondence after 6 May 2020 to the residential address identified for Ms Brooks in a contact tracing report commissioned by the Claimant, as well as to the Wellington Club address.
>
> None of the Tribunal's correspondence, whether by email or by post, to any address, was returned undelivered.
>
> The Tribunal was satisfied that the proceedings had come to the attention of Ms Brooks and that it was appropriate to proceed with the Final Hearing. There is no prospect of that decision being changed. The Tribunal made its decision on the evidence at the Final Hearing, which it was entitled to do.
>
> Yours faithfully,
>
> E Appiah
> For the Tribunal Office "

9. Meanwhile, a notice of appeal was submitted on 3 November 2020. On 24 July 2021 the appeal was sifted by Gavin Mansfield QC sitting in the EAT as a deputy High Court judge. He permitted three grounds to advance to this final hearing. He also ordered the claimant within 28 days to file and serve all evidence submitted to the ET relating to the appellant's address, including the "contact tracing report" referred to in the refusal of reconsideration and also including the record and orders of the two PHs on 6 May and 22 June 2020, which strangely are missing.

10. Neither the claimant nor any of the respondents to the original claim (other than the appellant) filed an answer to the appeal; nor did they respond to letters from the EAT sent on 24 July, 4 November and 18 November 2021. By an order of the registrar on 9 December 2021, they were debarred from taking any further part in the appeal.

11. The claimant then applied for a review of that order and for postponement of today's hearing. The registrar refused those applications on 20 January 2022. She noted that the basis for the application was that the claimant did not know of today's hearing date until 10 January 2022, when she received an email from the appellant. Her telephone had been stolen and she did not have access to email between 25 June and 14 September 2021. However, the EAT's letters of 4 and 18 November 2021 were sent by email, and the latter stated that the matter was listed for a full hearing on today's date and invited representations on the debarring order by 25 November 2021. There was no explanation of why the claimant received emails from the appellant but not from the EAT.

12. The claimant has not appealed against that decision and therefore played no part in today's hearing. She also has still not complied with the order of 24 July 2021. I therefore still cannot be sure what information the ET had about the appellant's residential address. However, the reconsideration decision itself contains the addresses of the parties. Counsel for the appellant

tells me that the address given for her there is an old address which she had left in 2018. I conclude that on the balance of probabilities, that wrong address is the one which the claimant provided for her.

Ground 3

13. As Ms Lydia Seymour, counsel for the appellant, said, ground 3 is really the meat of this case, because it alleges a fundamental error in the tribunal's substantive finding rather than just a procedural error, and I therefore take that ground first.

14. The evidence supporting the reconsideration application provides strong reasons to believe that the Wellington Club was owned and operated by a company, Bliss Hospitality Ltd, and not by the appellant. If that is right, it would remove the basis for the EJ's ruling against the appellant. On the face of it, therefore, the EJ's finding may well have led to injustice.

15. That suspicion adds focus to the questions of whether there was sufficient evidence before the ET to justify the finding against the appellant and of whether that finding was sufficiently reasoned.

16. Ms Seymour submits that there was insufficient evidence to justify the finding that the appellant was trading as the Wellington Club. There was no written contract of employment, and the only relevant evidence cited by the EJ in support of her conclusion was:

(1) the claimant was first told about the club by Mr Drummond, who said that he was a friend of its owner, the appellant;
(2) Mr Panayiotou in his response to the claim said, "Ms Nicola Brooks is the owner of the Wellington Club …";
(3) the claimant produced a magazine article which stated that the club was "the creation of Nic Brooks and Jake Panayiotou";

(4) the club's own response said that "the Wellington Club" was just a trading name;

(5) although the claimant's payslips referred to Asser Ltd, the club's own response just said, "See Asser Ltd for all employment information" and the appellant's response said that Asser Ltd had access to employment details and that she did not;

(6) there was no evidence of a partnership, and a company search revealed that Mr Panayiotou had been a director of a company which operated a previous "Wellington Club";

(7) the appellant's ET3 response did not say that any other person or legal entity was the employer.

17. Ms Seymour further submits that there was no proper reasoning for the finding that the appellant was not only trading as the Wellington Club but was also the claimant's employer. The EJ cited the seven points which I have just listed and said that "as the Wellington Club is not a legal entity, it appeared that an individual or partnership was trading in that name". She correctly found that Asser Ltd was not the employer (nobody now suggests that it was). She then found that the appellant "was therefore the claimant's employer".

18. In my view, although the employment judge was confronted with a task which was made difficult by the sketchy nature of the evidence, the series of reasons which she gave cannot be sustained.

19. I do not think any weight could realistically be placed on what the claimant said that Mr Drummond said to her. It logically shed no light on the presence or absence of any corporate vehicle owning the club and employing its staff.

20. Whilst the response of Mr Panayiotou might just have been sufficient to justify a finding that the appellant was in some sense the "owner", it was necessary to investigate what sort of corporate or business structure existed. He might have meant that the appellant was a sole trader

running the club, but that is not what he said and, as Ms Seymour says, it would be unusual for a private individual to run an inherently risky venture such as a large West End club in a private capacity rather than through a corporate vehicle. Mr Panayiotou could equally have meant that the appellant owned the shares in such a company or that she held a lease of the premises.

21. The magazine article could not logically have supported any conclusion about the ownership and corporate structure of the club, because it did not address those topics.

22. The club itself purported to file a response. It is not known who was responsible for that. It might now be thought that the response was disingenuous because if Bliss Hospitality Ltd does own the club, that response must have been sent on that company's behalf but it did not identify the company. Be that as it may, the response said that the club's name was just a trading name. That however did not mean that it was necessarily operated by an individual or partnership rather than by a company, and it would in my judgment have been illogical to give the response that meaning.

23. The involvement of Asser Ltd for payroll services was an entirely neutral factor and cannot logically have assisted the employment judge at all.

24. After the claimant had suggested that the appellant and Mr Panayiotou formed a partnership, the lack of evidence of any partnership if anything suggested that the claimant was simply wrong, and did not point towards the conclusion that one of the named individuals owned the club outright.

25. The absence of an explanation in the appellant's ET3 could not justify any findings in my view, because it was a response to a claim which did not allege that the appellant was the employer. The ET1 clearly alleged that Asser Ltd was the employer. I therefore consider that in placing weight on that point, the employment judge had regard to an irrelevant factor.

26. Those factors therefore did not logically justify the conclusion that the appellant was the claimant's employer. The ET did not squarely confront or discuss the lack of evidence to show who had entered a contract of employment with the claimant. It seems to me that its duty to confront that difficulty was heightened by the fact that the hearing was proceeding in the absence of all of the respondents. Ground 3 therefore succeeds regardless of the other procedural issues to which I now turn.

Ground 1

27. EJ Brown's judgment states that when the claim was originally served, the parties including the appellant were sent notices of hearing giving the dates of both the final hearing and the PH on 6 May 2020. The reconsideration refusal letter adds that no correspondence was returned undelivered.

28. However, the appellant says that she does not have copies of those notices and did not know about either hearing.

29. The appellant did receive the claim form in January 2020 and responded to it. As I have said, it did not suggest that she was the claimant's employer and therefore she did not address that subject in the response.

30. Ms Seymour submits that the EJ relied or must have relied on factors which were logically insufficient to justify proceeding with the final hearing on 22 September 2020 in the appellant's absence. Whilst it was known that the appellant had received the original claim, it could not be assumed that she knew she was now being pursued in the amended capacity of employer.

31. The letter refusing reconsideration reveals that tribunal correspondence after 6 May 2020 was sent to the address which the claimant had found for the appellant and which we have now been told was an out-of-date address.

32. In the final judgment setting out the chronology, the EJ said that after the amendment was allowed, the amended proceedings "were then served" on the appellant at her residential address. It now seems that that was a wrong address.

33. An ET has a wide discretion when there is an unexplained failure to attend by one party.

34. The EJ knew that the claim had been received by the appellant. It seems to me that she was entitled to assume that the notice of the hearing and the notice of the first PH had accompanied that claim as they usually would. However, her assumption that the amended claim had been served on the appellant turned out to be based on wrong information.

35. I bear in mind that any breakdown in communication was the appellant's fault. When she put in her response, she chose to give a work address rather than a home address and, when the club closed in March 2020, she failed to provide the tribunal with an updated address for any correspondence. It seems to me that she took the risk of not being kept informed, and her omission meant that the tribunal had no means of contacting her on the day of the hearing when she failed to appear. Nevertheless, although it might be said that she also took the risk of the final hearing taking an unexpected turn, I accept that a litigant in person might well not have appreciated that particular risk.

36. The fact that the amendment had not come to the appellant's attention therefore was not the employment judge's fault. Nevertheless, it seems to me that it undermined the proper exercise of her discretion. Not only was the appellant not there to defend herself but, unbeknownst to the employment judge, she had also never had any opportunity to respond to the claim that she was the claimant's employer. In those circumstances, the resulting hearing at which that claim was upheld was inevitably unfair. Ground 1 therefore succeeds as well.

Ground 2

37. By ground 2 the appellant contends that the EJ previously erred in law on 6 May 2021 when

allowing the claim to be amended so as to be directed against the appellant as employer.

38. Deciding this ground of appeal is made difficult by the lack of access to any record of the 6 May hearing. I have not seen the application to amend or any draft or actual amendment or the decision to allow it or any reasons for that decision.

39. This situation does not reflect very well on anyone involved. When the appeal was sifted on paper, an order against the claimant to provide the documents from the preliminary hearings was probably not the best solution given that the appellant, who had the primary responsibility of progressing the appeal, could easily have obtained them from the ET. However, the claimant, once ordered to provide those documents, should have provided them, even if she did not become aware of the order until earlier this month. The appellant meanwhile knew that the order had not been complied with but did not take steps to obtain the documents, although this would not have been difficult.

40. In this situation I cannot draw any inferences about the reasoning underpinning the decision to allow the amendment. I therefore cannot conclude that the reasoning was subject to any error such as a failure to apply the well-known principles in **Selkent Bus Company Ltd v Moore** [1996] ICR 836.

41. However, it does seem clear that there have never been any amended Particulars of Claim which set out the basis for the contention that the appellant was the claimant's employer. The EJ's final decision on the claim, which sets out a fairly detailed chronology, just says that there was permission to amend "to include the fifth respondent in all allegations against the claimant's employer".

42. I will add in passing that this form of amendment, the result of which was that the appellant was named as the third respondent to the claim and then named again as the fifth respondent with the addition of "T/A The Wellington Club" was inappropriate and potentially misleading.

The appellant was at all times a respondent in her personal capacity. The amendment should have consisted of additional particulars explaining why she was alleged to have been the claimant's employer.

43. I accept Ms Seymour's submission that the ET erred by granting permission for an amendment which was not sufficiently particularised. The principle was stated by Judge Serota QC in **British Gas Services Ltd v Basra** [2015] ICR D5 at paragraph 48:

> "It is essential before allowing an amendment that it must be properly formulated, sufficiently particularised, so the Respondent can make submissions and know the case it is required to meet."

44. In the present case, that omission had a significant effect. The amendment had been sought on the basis that the appellant and Mr Panayiotou had formed a partnership to operate the club. At trial there was no evidence of that, whereupon individual responsibility was placed on the appellant in the unsatisfactory way which I have identified under ground 3 above.

45. The appeal is therefore allowed on ground 2 as well.

Disposal

46. The ET's judgments and orders of 24 September 2021 and the decision to allow an amendment on 6 May 2021 are set aside.

47. That includes a part of the September order which contains a typographical error. Having found as a fact that there was an unlawful deduction from wages of £320, the ET in paragraph 6 of its judgment required the appellant to pay £3,200 instead of £320. Ms Seymour sought to advance a new ground of appeal out of time to correct the error if necessary. As the judgment is being set aside, I need say no more about that save to note that the addition of a zero was obviously an error.

48. In respect of ground 3, I have been asked to substitute a finding that the appellant was not the claimant's employer. Taking that course would in particular have the merit of making the amendment application academic.

49. However, applying the well-known principles in **Jafri v Lincoln College** [2014] EWCA Civ 449, whilst that finding is likely, I cannot say that it is the only outcome which is reasonably possible. I also bear in mind that the claimant has not participated in this hearing and has therefore not had the opportunity to debate the issue in the light of the up-to-date evidence. As the history of the ET hearing in the present case shows, that is a reason to be doubly cautious.

50. Cases such as **Jafri** and **Burrell v Micheldever Tyre Services Ltd** [2014] ICR 935 make clear that a point can also be decided by the EAT and not remitted to the ET if the parties consent. Ms Seymour has suggested that that principle can be applied where all parties save one have been debarred from participating in the appeal and a single participating party "consents". It seems to me that that interpretation cannot be right, at least on the facts of this case. The claimant may have been debarred, but she is still a party to the appeal and to the underlying litigation, and therefore I think that as a minimum her consent would be needed.

51. The claim will therefore be remitted to a differently constituted ET for case management, starting with the amendment application (if it is pursued), and for the final hearing of all issues. It does not seem to me that any findings from the September hearing can or should be preserved. In those circumstances I consider that the employment judge who heard the case over two days in September would be placed in an unfairly difficult position by being asked to redecide the case on different evidence.