Neutral Citation Number: [2024] EAT 123

Case No: EA-2021-000738-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Buildings,
Fetter Lane, London, EC4A 1NL

Date: 27 June 2024

Before:

HIS HONOUR JUDGE AUERBACH

Between:

MS MATHY JORINE MATONDO

Appellant

- and -

KINGSLAND NURSERY LIMITED

Respondent

MR DANIEL HALLSTRÖM (Legal Officer, **Free Representation Unit)** for the **Appellant**
MR KEITH UBAH (director) for the **Respondent**

Hearing date: 27 June 2024

JUDGMENT

SUMMARY:

PRACTICE AND PROCEDURE – Evidence

Following the end of her employment the claimant brought a complaint of unlawful deduction from wages. In particular, she claimed that she had not been paid for all the hours of overtime that she had worked. Before the tribunal there was a factual dispute as to how many hours of overtime the claimant had in fact worked.

The tribunal erred by apparently requiring the claimant's oral evidence, based on her recollection, to be corroborated by other evidence, such as independent documentary records. There is no such rule of evidence. The tribunal should have appraised all of the different sources of evidence, as to their reliability and credibility, including the claimant's oral testimony, contemporary (though not independent) communications reflecting what she had said when she had raised her grievance during employment, work records relied upon by the respondent, and the respondent's evidence about how pay was calculated and those records compiled. It should then have made findings of fact about what hours the claimant had or had not worked, based upon its assessment of the overall picture.

Hovis Ltd v Louton, 2020-000973-LA, 22 November 2021, discussed.

HIS HONOUR JUDGE AUERBACH:

1. The claimant in the employment tribunal worked in the respondent's nursery as a nursery practitioner from 2 July 2018 to around 31 July 2019. Thereafter she presented a claim for unlawful deductions from wages and holiday pay. The claim was heard over CVP at Bury St Edmunds by Employment Judge K Palmer. The wages claim failed. The holiday pay claim succeeded. I have heard the claimant's appeal against the decision dismissing her wages claim.

2. At the hearing in the tribunal, the claimant was represented by a Free Representation Unit volunteer, Ms Delpino-Mark, and the respondent by a director, Keith Ubah. At the hearing of this appeal today the claimant has been represented by Mr Daniel Hallström, legal officer from FRU. The respondent indicated in correspondence with the EAT initially that it would not be defending this appeal. However, subsequently, Mr Ubah sent in a skeleton argument attaching various materials and he has attended to represent the respondent today. In discussion at the outset Mr Hallström indicated that he did not take any point about the fact that the respondent had not entered an Answer formally indicating its intention to resist the appeal.

3. In the course of argument this morning and discussion, I explained to Mr Ubah that it is not the function of the EAT to conduct a retrial and that it cannot do so. I explained that the EAT's function is limited to deciding whether this appeal should be allowed on one or more of the grounds asserting that the judge erred in law, or whether it should be dismissed. If the appeal was allowed, save in certain kinds of case, ordinarily that would mean that the matter would have to return to the employment tribunal to decide the issue in question afresh.

4. Following Mr Hallström's oral argument in support of the two grounds of appeal, Mr Ubah indicated that in all the circumstances he did not any longer resist the appeal being allowed and he was content, on that basis, for the matter to return to the employment tribunal for a rehearing. Both Mr Hallström and Mr Ubah agreed that if I did allow the appeal and remit

the matter to the employment tribunal I should not give any particular direction as to whether it should or should not be reheard by the same judge as previously. Mr Hallström also indicated that he would not, on behalf of the claimant, object in that case to the tribunal considering, upon remission, as well as evidence that was before it last time, certain other evidence on which the respondent wishes to rely, but which was not before the tribunal last time.

5. Notwithstanding the stance now taken by Mr Ubah, I do have to be satisfied before allowing an appeal that it is the appropriate thing to do and that the judge did, indeed, err in law. I will, therefore, turn to describe in more detail the nature of the dispute, and the relevant parts of the tribunal's decision and I will then consider the grounds of appeal.

6. In summary, the claimant claimed principally that she was owed wages in respect of time that she had worked over and above her core hours. In particular, her claim was that, starting from when her employment began, and running through to January 2019, it had been agreed that on two particular days of the week she would work longer than standard hours: effectively, therefore, working some hours of overtime every week. She also claimed that in January 2019 there was then a variation of the agreement as to the days on which she would work overtime and the hours of overtime that she would work. The main part of her claim was to the effect that she had not been paid throughout her employment in respect of the overtime hours, although she additionally claimed that there was a shortfall in her wages for the first month, and that there were certain other particular days in respect of which she had not received full payment for the hours she had worked.

7. The evidence on which the claimant relied before the tribunal was her own evidence, giving her account of what she said had been agreed and what hours she said she had worked, from week to week and month to month, in accordance with that agreement. She put in front of the tribunal, schedules that had been compiled by her, with some assistance from her

representatives, breaking down the hours that she said she had worked, day by day and week by week. She did not claim that these were contemporaneous documents. They were documents that had been compiled and prepared for the purposes of supplying the detailed breakdown of her calculations to the tribunal and in support of her witness evidence.

8. The issues which later formed the subject of the claimant's tribunal claims had also, at certain point, been raised by her during the course of her employment, before it ended. There were in the tribunal's hearing bundle, copies of various contemporary communications, such as emails, letters or texts, showing what the claimant was saying at the time to the respondent, when she raised these matters during the course of the final months of her employment, were the hours that she had worked and not been paid for.

9. For the respondent, Mr Ubah told the tribunal that contemporaneous signing-in sheets were compiled on a daily basis by its managers, whereby manuscript records were kept for each day showing which individuals had worked that day and their start and finish times. He presented to the tribunal, documents variously described as spreadsheets or timesheets, and told the tribunal that the content of these was based on the content of the timesheets. He told the tribunal that, although staff were ordinarily paid monthly in arrears, in the claimant's case she was, at her request, paid monthly in advance. He told the tribunal that this meant that what was recorded in each spreadsheet partly reflected the actual hours the claimant had worked in a given month, but was in part a projection of what she was expected to work.

10. The tribunal records in its decision that Mr Ubah brought with him to the hearing, and sought to have admitted into evidence, one or more of the signing-in sheets which he said were the primary records showing the actual hours the claimant had worked each day. But these documents were not in the tribunal's bundle that had been prepared for the hearing. As the tribunal describes in its decision, the judge declined to permit those primary records to be

introduced, because he considered that to do so would be unfair to the claimant and her representative, who would not have had sufficient opportunity to consider them.

11. However, the judge then went on to say the following in reaching his conclusion with respect to the wages claim:

> **"14. Having said that, the failure of the Respondents to produce that documentation does not, in my Judgment, make any difference to the outcome of this unlawful deductions claim.**
>
> **15. In light of the evidence that I have before me, I am simply not convinced that the Claimant has produced sufficient evidence to show that she actually did work the hours which she is claiming. The schedule which has been produced in the schedule of loss, is very closely aligned to the predicted timesheet spreadsheet that the Respondents have produced and as the burden of proof is on the Claimant to show that she did actually work the hours which she said she worked, I am not convinced that she has been able to do that. The figures which she has given to her very well prepared advocate, Ms Delpino-Mark, to produce the well put together schedule of loss are based on her memory and her supposition. She does not have any definitive evidence that supports her claim and therefore I am bound to come to the conclusion that she has not succeeded in convincing me on the balance of probabilities that she was underpaid the sum of £880.48.**
>
> **16. Therefore, her claim for unlawful deduction of wages fails."**

12. Two grounds of appeal, one of them by amendment, have been permitted to proceed to the full appeal hearing today. The first contends in summary that the tribunal erred by imposing a requirement for corroborative evidence, over and above the claimant's own evidence as to her recollection of events, in terms of the hours that she said were agreed and that she said she did in fact work. That is said to have been an error of law because there is, as a matter of law, no requirement for the evidence of a witness to be corroborated by documents or other supporting evidence.

13. Mr Hallström accepted that the tribunal was entitled to take into account that the claimant's evidence was based in part on her recollection, but it still needed to evaluate the reliability of that evidence set alongside the other evidence, including the communications arising from the claimant's complaints during employment, the respondent's evidence of its

record-keeping and the evidence from Mr Ubah. In summary, the claimant says that the tribunal erred by not weighing up all of this evidence and by simply dismissing the claim on the basis that the claimant's witness evidence was uncorroborated by other definitive records.

14. The second ground, somewhat overlapping with the first ground, concerns the burden of proof. Reference is made to the Court of Appeal's decision in **Morris v London Iron and Steel Company Limited** [1987] ICR 855. It is said that the tribunal erred by relying on the burden of proof rather than getting to grips with the detail of the evidence before it and making findings of fact, so far as it could, drawing upon that evidence.

15. Mr Hallström also submits that this was not an all or nothing case. The tribunal might have found the claimant's claim to be fully made out in respect of all the occasions where she claimed she had not been paid for the hours worked, not made out at all, or partially made out in respect of some occasions but not others. It needed to work through the detail of the evidence in order to come to a properly-reasoned decision as to whether her claim succeeded in whole, failed in whole, or succeeded in part.

16. In **Hovis Ltd v Louton**, EA-2020-000973, 22 November 2021, a similar type of challenge arose. In that case I noted that there are no strict rules of evidence in the employment tribunal, although witness evidence should be taken on oath or affirmation. The task of the tribunal in the given case is to weigh up all of the evidence, decide what evidence is reliable or credible and what is not, and to make findings of fact drawing on its overall appraisal of the different kinds of evidence that may be presented to it.

17. In that case the particular issue revolved around the approach to hearsay evidence. In the present case the particular issue revolves around the approach to witness evidence based on recollection, but which is not corroborated by primary contemporary independent records. Mr Hallström is correct to say that there is no rule to the effect that such witness evidence cannot

be relied upon or cannot be treated as persuasive if it is not corroborated by other evidence that the tribunal might regard as definitive. Nor indeed is there any rule that a tribunal is bound to accept opposing evidence which is said to be a contemporaneous primary record, as *necessarily* trumping evidence based on recollection, as there may be issues raised as to the reliability of the record-keeping, for example. Every case must turn on its own facts and on the tribunal's fact- and evidence-sensitive evaluation of the overall evidence presented to it.

18. Did the present tribunal err then by taking the approach that the claimant's claim failed because of the lack of corroborative evidence? Mr Hallström relies in particular on the tribunal having stated at [15] that the claimant had not produced sufficient evidence to show that she actually did work the hours that she was claiming, that her evidence together with her schedules were based on her memory and her supposition, and particularly the next sentence in which the tribunal stated: "She does not have any definitive evidence that supports her claim and therefore I am bound to come to the conclusion that she has not succeeded…".

19. As to this, I do note that the tribunal began [15]] with the words: "In light of the evidence that I have before me". It also. in the course of [15], referred to the spreadsheet that had been presented by Mr Ubah and it said that the claimant's schedule of loss was very closely aligned to it. That might suggest that the tribunal attached some weight to the spreadsheet produced by Mr Ubah as supporting the respondent's contention that the claimant's account was unreliable, because her recollection was based, or based in part, on a projection rather than what she might in the event have actually worked. However, if that was what the tribunal thought, it did not clearly spell it out or put forward any more detailed analysis of how the claimant's evidence compared to the evidence of the spreadsheet.

20. The tribunal's use of the expression: "She does not have any definitive evidence" is also troubling. The tribunal might possibly have meant simply to make the point that she had

not produced any contemporaneous primary records that might be regarded as particularly reliable, but, again, if so, it did not say so. The tribunal's use of the expression "I am bound to come to the conclusion" is also at best ambiguous. Mr Hallström submits that this is a clear indication that the judge assumed that he was bound by some rule of law to regard evidence based on recollection as not sufficient by itself, which would be a plain error.

21. As to that, sometimes in judicial decisions, the expression "I am bound" is used not in that precise sense, but to convey a more general proposition that the evidence points inevitably to a certain conclusion. But, because of its ambiguity, this is an expression that is better avoided; and I cannot be entirely confident that the judge did not think that he was bound by some principle or rule of law to look for corroboration of the claimant's witness evidence. That is particularly given that [15] was preceded by [14], in which the judge said that the fact that the records that Mr Ubah said were the respondent's own primary records had not been admitted, did not make any difference to the outcome. I therefore cannot rule out that the judge did err by focusing entirely on the oral evidence of the claimant and concluding that it could not make good her claim because she did not have any other evidence to corroborate it.

22. My misgivings are reinforced by the fact that there appears to have been no consideration given to the evidence that was before the tribunal of the contemporary communications that occurred when the claimant raised her initial grievance. It might have been said, of course, that that was not independent evidence or a primary record of what hours she had worked; but it was evidence of what she was, at the time, saying was the position, much sooner after the periods in respect of which she was claiming to have been underpaid than when she was giving evidence in the employment tribunal. Whether the tribunal regarded that evidence of earlier complaint as reliable, or what weight to attach to it, would, of course, have been a matter for the tribunal's appreciation. But in principle it ought to have been considered.

23. For all of these reasons I do regard this decision as unsafe and ground one succeeds.

24. Ground two does not materially add anything to ground one. Mr Hallström is right in principle to say that upon scrutiny it is a possible outcome that the claim will wholly succeed or wholly fail or that it may succeed in part. That does not necessarily mean that the tribunal would need to examine the evidence separately, and item by item, for each single day of the claimant's employment in turn, as it may be that the evidence and the arguments, and the way they are presented, enable the tribunal, for example, to deal with different types of sub-claim and/or with different periods of time, as units, without having to descend to a more granular level of analysis within each of those units. That would depend on the precise detail of the arguments about what the claimant said had gone wrong and why, and what the respondent said in response. There can be no hard and fast rules about this aspect.

25. However, for the reasons I have given, I am satisfied that the appeal should be allowed and that the EAT is not in a position on this occasion to substitute its own decision. The matter must be remitted to the employment tribunal. As I have said, the parties are agreed, as am I, that I should not give any particular direction as to whether this matter on remission is or is not heard by the same judge. Both parties are keen, above all, given the time that has passed, for the rehearing to take place as soon as it practically can, when it returns to the tribunal.

26. I note, as I said earlier, that Mr Hallström has already indicated that the claimant would not object, at the relisted hearing, to the respondent having the opportunity to put before the tribunal what it says are the primary records by way of the signing-in sheets, along with all the other documentary or witness evidence that either party may say is relevant.

27. I make these further observations about the evidence. I understand that, although there was a witness statement from the claimant last time, there was no statement from Mr Ubah,

although the tribunal did hear from him and take into account what he said. It is also not clear to me whether witnesses were required to take the oath or affirm.

28. In general, case management is a matter for the tribunal, and tribunals have considerable discretion as to the degree of formality observed at such hearings: see rule 41. But it will be important in this case that, in advance of the retrial, appropriate directions are given to ensure that, in respect of those individuals who either side wishes to call to give evidence, witness statements are prepared and exchanged in advance; that an orderly process of disclosure of all documentary evidence of any sort on which either party wishes to rely at the hearing is followed in advance, so that the bundle is complete as far as can be anticipated; and that at the hearing itself, those giving oral evidence (whether or not they are also acting as representatives), give their evidence on oath or affirmation, as required by rule 43.