Appeal No. UKEAT/0135/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 October 2019

Before

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

CHELMSFORD UNISEX HAIR SALON LTD APPELLANT

MISS KAOMI GRUNWELL

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MISS KAOMI GRUNWELL (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Appearance/response

PRACTICE AND PROCEDURE – Absence of party

The Respondent did not file a response to the Claimant's claim before the Employment Tribunal. Judgment on liability was entered and the scheduled preliminary hearing was converted to a remedy hearing. The judgment and the new notice of hearing were sent out. The Respondent did not attend the hearing. The Claimant was awarded compensation by the Employment Tribunal at that hearing. The Respondent then sought to appeal the Employment Tribunal's decision on remedy on that basis that the claim had not come to the attention of the director of Respondent. The ET1, judgment and correspondence from the Tribunal had however been sent to the Respondent's correct address (and at least some of that correspondence had been received at that address prior to the remedy hearing). The appeal was stayed for the Respondent to make an application for reconsideration to the Employment Tribunal, however none was made. Written reasons for the decisions on liability and remedy were not requested from the Employment Tribunal. Nor did the Respondent file, either with the Employment Tribunal or with the Employment Appeal Tribunal, an ET3 form and draft grounds of response to the claim. The Respondent's representative did not participate in preparing the bundle for the appeal hearing, which was prepared by the Claimant. The Respondent did not file a skeleton argument and did not attend the hearing of the appeal before the Employment Appeal Tribunal, nor did its representative attend on its behalf.

The Employment Appeal Tribunal dismissed the appeal, holding that the grounds of appeal advanced disclosed no error of law on the part of the Employment Tribunal in proceeding to reach its decision on remedy as it had done in these circumstances. The case was distinguishable from **Office Equipment Systems Ltd v Hughes** [2018] EWCA Civ 1842, [2019] ICR 201**,** where the

Employment Tribunal had refused an application by the respondent to participate in determining remedy and had proceeded to determine remedy without a hearing. Here, there was hearing to determine remedy. The Respondent was sent notice of that hearing but did not attend. The Employment Tribunal proceeded to determine remedy in the Respondent's absence, which was not itself an error of law.

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

1. In this Judgment I will refer to the parties as they were in the proceedings below, that is as "Claimant" and "Respondent".

2. This is an appeal against a Judgment on remedy issued and sent to the parties on 25 July 2018 by the Employment Tribunal ("ET") sitting at East London following a Hearing on 23 July 2018. By that Judgment the ET ordered the Respondent to pay to the Claimant the sums of £716 in respect of holiday pay and £17,839.09, inclusive of interest, in respect of pregnancy discrimination.

3. The Respondent filed the appeal in this Tribunal on 30 August 2018. The appeal was stayed to enable the Respondent to make an application for reconsideration to the ET, a matter to which I will return in due course. The appeal was considered on the papers following the expiry of the stay by His Honour Judge Auerbach who directed there be a Full Hearing of the appeal.

4. I should at this point note that the Respondent has not appeared and is not represented today before me. This is despite the fact that the Respondent filed this appeal by instructing accountants, Leggatt Bell Limited of Chelmsford, who are so far as I am aware still on the record as representing the Respondent. Nonetheless, it appears that not only has no preparation been conducted on behalf of the Respondent for the hearing in terms of a skeleton argument or any authorities being filed, but also that the entirety of the appeal bundle was prepared by the Claimant, Miss Grunwell, who appears before me in person today. Miss Grunwell tells me that her correspondence with the Respondent's accountants regarding the preparation of the bundle went unanswered.

5. It appears that the Respondent, via its accountants who are still on the record as acting for it on this appeal, has not engaged with the preparation for this Hearing or with the appeal process for a number of months now. There is no explanation provided for that, nor as I have said has the Respondent attended before me whether by its accountants or by its director today. This matter was called on at 10.30 this morning. After hearing briefly from Miss Grunwell, I put the matter back to 11 o'clock to enable the Respondent to attend. No one has appeared. I am now at shortly after 11 o'clock giving Judgment on the appeal.

6. The background to the appeal is that by her ET1 claim form filed with the ET on 7 May 2018, the Claimant contended that she was employed by the Respondent as a hairdresser from 30 October 2017 until 31 March 2018. She contended she was employed to work 24 hours per week under a contract of employment which had been agreed verbally. The Claimant contended that following her disclosure that she was pregnant the Respondent dismissed her, stating there was no more work for her do. The Claimant contended in her ET1 that this dismissal was because the Respondent did not wish to pay her maternity pay and that a full-time hairdresser had been employed to take her place. She claimed compensation for discrimination on the ground of pregnancy and also unpaid holiday pay.

7. Following the presentation of the claim, a Case Management Hearing was listed before the ET to take place on 23 July 2018. The Respondent did not, however, file an ET3 response form within the required period. On 11 July 2018, Employment Judge Gilbert entered a Judgment in favour of the Claimant and directed that the Hearing listed for 23 July 2018 would proceed as a Remedy Hearing. That Judgment was sent to the parties on 12 July 2018. A new notice of hearing was sent out by the ET on 13 July 2018, pursuant to the Liability Judgment and Judge Gilbert's direction, stating that there would be a Remedy Hearing at the East London ET Hearing

Centre on Monday 23 July at 10.00am. In accordance with the provisions of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules"), the notice of hearing stated that it was being sent to the Respondent for information only. In addition, it was stated that unless and until an extension of time was granted to present a response, the Respondent would only be entitled to participate in the Hearing to the extent permitted by the Employment Judge who heard the case and that a copy of the Decision of the Tribunal would be sent to the Respondent.

8. Although the Judgment on liability and indeed in due course on remedy was entered against the present Respondent, Chelmsford Unisex Hair Salon Limited, and the address given for the Respondent on the ET1 claim form and in the correspondence sent by the Tribunal was 37 Duke Street, Chelmsford, the address of the salon at which the Claimant worked, the correspondence sent by the ET was also marked as being for the attention of Mr Ismail Emin. On 16 July 2018, Mr Emin sent an email to the ET in which he stated that he was the owner of 37 Duke Street and that he had leased the property to the Respondent but that he was not a director of the Respondent. He stated that the salon had closed down and was no longer trading. He stated that he had received correspondence from the ET, although it is not clear precisely what he had received. He said that he would not be able to attend what he described as the "Preliminary Hearing" on 23 July 2018 because he was abroad.

9. On 23 July 2018, the Remedy Hearing took place at East London before Employment Judge Goodrich. The Claimant attended in person. The Respondent did not attend and was not represented. Judge Goodrich made an award of the sums to which I referred at the beginning of this Judgment.

10. Thereafter, or about 27 July 2018, the Respondent, acting by its accountants Leggatt Bell, filed an appeal with this Tribunal against the Judgment of Judge Goodrich. The appeal was not properly instituted due to lacking the required documents. That was corrected and the appeal was properly instituted on 30 August 2018. There was a direction for a stay for an application for reconsideration to be made to the ET by the Respondent. No such application was in fact made. Nor, an issue to which I will return, has there been any application to the ET for Written Reasons to be provided for either of its Judgments, whether on liability or remedy. Nor has the Respondent ever filed an ET3 response form with the ET or draft grounds of resistance to the claim.

11. For the purposes of the appeal before this Tribunal, the Respondent has not complied with paragraph 18 of the **Practice Direction (Employment Appeal Tribunal - Procedure) 2018** dealing with the situation where the appellant is a respondent before the ET, but did not present an ET3 response to the ET. In particular, there has been no draft ET3 response form exhibited by the Respondent. Insofar as the Respondent seeks to contend that the underlying merits of its defence of the claim are made out, they are set in the grounds of appeal to which I will return.

12. However, as I have said, there has not been full compliance at the very least with paragraph 18 of the **Practice Direction** in these circumstances, albeit that there has been a short statement filed on behalf of the Respondent by Mr Emin and his daughter, Miss Miriam Emin, to which I will return in due course.

13. Turning to the grounds of appeal filed with this Tribunal, the Respondent contends the Claimant was not an employee; that the salon was closed because it was loss making and that it had ceased to trade. It is stated that Mr Emin is not a director or employee of the Respondent,

A although it is said that he did take responsibility for contacting the Claimant when required to assist his daughter, Miss Emin, who was the sole director of the Respondent.

B 14. The grounds of appeal stated the original paperwork regarding the case was not received and that Miss Emin was not aware of the situation until 27 July 2018. This is amplified in the witness statement filed on behalf of the Respondent dated 11 October 2018, in which it is stated that copy paperwork was requested from the ET on 16 July 2018, but this was not received. In addition, it is said that Mr Emin had informed the ET that he would be unable to attend the Hearing on 23 July 2018. It is said that Mr Emin assumed that the Respondent Company would be contacted regarding the dispute. That is the sum of the witness statement that has been filed, namely that an assumption was made that the Respondent would be further contacted; that this did not happen and that the next material received from the ET was the Judgment.

E 15. Nonetheless, it is clear from the papers that I have seen that the ET1 and the correspondence sent by the ET was addressed to the Chelmsford Unisex Hair Salon at the address given by the Respondent on its Notice of Appeal, 37 Duke Street in Chelmsford. Although the ET1 does name Mr Emin in the details given for the Respondent and also refers to a company called Goodfellows (Chelmsford) Limited, the name Chelmsford Unisex Hair Salon was set out on the face of the ET1. In addition, as I have said both Judgments and the ET's correspondence were sent to Chelmsford Unisex Hair Salon, FAO Ismail Emin and both Judgments have been entered against Chelmsford Unisex Hair Salon Limited. That company was the Respondent before the ET and is the appellant in these proceedings.

H 16. It is also clear that the correspondence relating to that claim was received at that address, that it was opened by Mr Emin, and that he at least was aware of the hearing on 23 July 2018. I

should add that social media messages between Miss Emin and the Claimant which have been provided by the Claimant in the appeal bundle indicate the Claimant had told Miss Emin on 1 April 2018 of her intention to bring the ET proceedings because "[your] dad had completely cut my hour [sic]" and that Miss Emin told the Claimant that she was "sorry about how he [i.e. Mr Emin] has handled the whole situation." That is the factual background to the appeal which proceeds before me now.

17. When considering the papers following the expiry of the stay, for the purposes of the sift, His Honour Judge Auerbach considered this appeal was arguable on the basis of the Court of Appeal's decision in the case of **Office Equipment Systems Ltd v Hughes** [2018] EWCA Civ 1842, [2019] ICR 201, an appeal from this Tribunal. I can see why His Honour Judge Auerbach did so because he was not, at that stage, in possession of all material correspondence and Orders of the ET, in particular the Liability Judgment and the notice of Hearing stating that the Preliminary Hearing was instead to proceed as a final Hearing on Remedy.

18. In deference to the view of His Honour Judge Auerbach and given that the case has been relied upon when this appeal was permitted to proceed on the sift, I will deal shortly with the differences between that case and this one. In the case of **Office Equipment Systems Ltd**, again the respondent before the ET failed to submit an ET3 response form and a Judgment was entered in the claimant's favour. The complaint made before this Tribunal and then in the Court of Appeal related to the decision on remedy. The circumstances in which that came about were that the ET had stated to the solicitors for both parties that there was sufficient material on which to make a determination on remedy, without the need for a Hearing, and had declined an express request by the Respondent in that case to participate at the remedy stage; see paragraph 9 in the Judgment of Bean LJ. In due course, the ET provided to the parties what was described as a draft

finding in a remedy decision made by an Employment Judge sitting alone on considering the papers. The award was substantial, something in the region of £70,000.

19. The Court of Appeal considered that the ET had been wrong not to permit the Respondent to make representations in these circumstances. At paragraph 19 of his Judgment, Bean LJ said that there was no absolute rule that the Respondent who was debarred from defending an ET claim on liability was always entitled to participate in the determination of a remedy. In addition, the Lord Justice considered that in small cases a Respondent who had been debarred from defending the claim could have no legitimate complaint if an ET proceeded to hear the case on the scheduled date, determined liability and made an award, albeit that it would be wrong to refuse to read any written representations.

20. Bean LJ stated that, however, where there was a separate assessment of remedy after Judgment only in an exceptional case should the respondent be excluded from participating in an oral hearing and still rarer should it be the case that the ET should refuse to allow the respondent to make written representations on remedy, as of course had occurred in that case. Bean LJ considered that there was no reason why the respondent should have been precluded from making submissions on the quantum of the claim following the Judgment on liability. In addition, the respondent should have been invited to make such submissions by a specified date and then the ET should have considered whether an oral hearing was required. That not having been done, the Court of Appeal allowed the appeal, set aside the decision on remedy and remitted the matter to the ET.

21. It will be immediately apparent that the case dealt with by the Court of Appeal has significant differences to the present case. Firstly, the remedy issue was determined entirely on

A the papers without an oral hearing being directed. Secondly, the Respondent's express request to participate in the paper determination of the remedy was refused by the ET in circumstances where the award as I have said was in the order of £70,000.

B

22. In the present case, however, albeit the material Orders and correspondence were not before His Honour Judge Auerbach when the matter was considered at the sift stage, the ET sent a Judgment on liability to the parties stating that the Preliminary Hearing would proceed as a C Remedy Hearing and then sent a separate notice of hearing to the parties stating again that the Remedy Hearing would take place on 23 July 2018 and stating that, as required by the **ET Rules**, the Respondent would be permitted to participate to the extent that the Employment Judge hearing D the appeal thought fit.

23. In my judgment, the case of **Office Equipment Systems Ltd** is distinguishable on the facts from the present case because of those significant differences. E It remains to be considered, however, whether the grounds of appeal disclose any error of law on the part of the ET, notwithstanding the Respondent has not appeared today to argue them. The grounds of appeal contend that the ET did not consider the full facts; that the Claimant was in fact employed on an F *ad hoc* basis; that all employees left the salon by the end of March 2018 and that the shop was making losses and that the treatment of the Claimant was not to do with pregnancy or maternity. The fact that Mr Emin is not a director or employee of the company is repeated, as is the statement G that Miss Emin was not aware of the situation until 27 July 2018.

24. In my judgment, the grounds of appeal do not disclose any error of law on the part of the ET. This Tribunal deals with appeals on points of law from the ET. It does not retake decisions H already made by the ET, reconsider the facts or reach a fresh decision except in circumstances

where there had been an error of law on the part the ET. The complaints made by the Respondent in the grounds of appeal might have persuaded an Employment Judge sitting in the ET to reconsider one or both of the Judgments entered against the Respondent in July 2018, using the ET's powers under Rule 70 of the **ET Rules**. However, as I have said, no such application was ever made by the Respondent despite the stay granted for that purpose by this Tribunal.

25. For present purposes, in my judgment is it sufficient that the claim form was addressed to the Respondent salon at the correct address, which is that given on the Notice of Appeal. There is nothing to show it was returned undelivered. Correspondence had certainly got through by 16 July 2018, when Mr Emin sent his email to the ET. Albeit that the corporate name of the Respondent was not given on the ET1, it was clear from the face of the ET1 that the Claimant was complaining about her employment at the Chelmsford Unisex Hair Salon. Indeed, both Judgments were entered against the present Respondent company, Chelmsford Unisex Hair Salon Ltd. The material sent by the ET and indeed that sent by the Claimant was sent to the correct address and was addressed to the salon. Mr Emin recognised it as such in his email of 16 July, albeit he said that he was not the appropriate person to deal with it. Nonetheless, the material did get through.

26. In those circumstances, the ET was in my judgment entitled to proceed as it did in both the Liability and Remedy Judgments, although it is important to record that the Liability Judgment is not challenged in this appeal. There is nothing to show that this correspondence was sent to an incorrect address; the name of the Respondent that appears on the ET's Judgments and the name on the Notice of Appeal are the same and the address to which all correspondence was sent and the address on the Notice of Appeal are the same.

A

27. The ET's decisions do not on their face betray any error of law in these circumstances. The matters set out in the grounds of appeal do not disclose any error of law on the part of the ET. The Respondent, as I have said, has not produced a draft ET3 or grounds of resistance, has never made an application to the ET for that purpose, and has not applied for Written Reasons for the ET's decisions to enable any further scrutiny by this Tribunal of those Decisions beyond what appears on their face. I am unable to discern any error of law on the part of the ET in proceeding as it did to determine remedy in these circumstances. I should add that notwithstanding that Mr Emin had said that he was unable to attend the Hearing on 23 July 2018, the email in which he said that also indicated that he was not the appropriate person to deal with the claim and that the company was being run by someone else. The Respondent's grounds of appeal in this case suggest however that Mr Emin did have a role in dealing with the Claimant regarding her employment, as do the social media messages. The ET was entitled, in my judgment, to proceed to determine remedy in the absence of the Respondent in these circumstances and its decision to proceed was one which it was entitled to reach.

B

C

D

E

28. The Respondent having not applied to the ET for reconsideration, having not provided a draft ET3 and draft grounds of resistance and having not explained in any detail at all why no action was taken prior to the Hearing on 23 July 2018 and why no application for reconsideration has been made to the ET, in my judgment this appeal must fail and I will dismiss it for those reasons.

F

G

H