Neutral Citation Number: [2022] EAT 100

Case No: EA-2021-000338-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 July 2022

Before :

JASON COPPEL QC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MRS DURGA DEVI DHUNGANA	**Appellant**
- and -	
1) MR R S RAI 2) MRS A RAI	**Respondents**

- -
- -

Jayantilal Patel (instructed under the auspices of Advocate) for the **Appellant**
The Respondent did not appear and was not represented

Hearing date: 3 March 2022

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JUDGMENT

SUMMARY

CONTRACT OF EMPLOYMENT AND JURISCICTIONAL/ TIME POINTS

The appeal was against the refusal of a tribunal to extend time on just and equitable grounds for the bringing of a claim by the Second Claimant for a redundancy payment under section 135 of the Employment Rights Act 1996. The tribunal's reason for that decision was that the Second Claimant would be unlikely to establish that she was an employee of the Respondents, because there was no mutuality of obligation between them. The Appeal Tribunal held that the tribunal had erred in reaching that conclusion on the evidence before it and that that conclusion was sufficiently material to its refusal to extend time as to warrant the remission of the issue of extension of time for a fresh decision.

JASON COPPEL QC (DEPUTY JUDGE OF THE HIGH COURT):

Background

1. This is an appeal against a ruling of Employment Judge Reid, dated 6 January 2021, dismissing the appellant's claim for a statutory redundancy payment on the grounds that it had been presented out of time, and it was not just and equitable to extend time pursuant to section 164(2) of the Employment Rights Act 1996. The judge made various other rulings in the decision in question, but following a preliminary hearing before me on 17 September 2021, I granted permission to appeal only against the dismissal of the claim for a redundancy payment.

2. The appellant's claim, and this appeal, form only one part of litigation being pursued by the appellant and her husband, against the respondents, arising out of her husband's admitted employment and her alleged employment as domestic servants residing at the respondents' property.

3. So far as the appellant's claim for a redundancy payment is concerned, the tribunal reasoned as follows:

> **"The Respondents are not significantly prejudiced in practical terms by the delay in the Second Claimant bringing her claim for a statutory redundancy payment given that her claimed employment is said to run alongside that of the First Claimant who had also brought such a claim to which the Respondent has already responded (page 442). However, even if the Second Claimant working illegally were not a bar to the claim (taking into account the guidance as to the relevant factors set out in Patel v Mirza 2017 AC 467, SC and Stoffel and Co v Grondona 2020 UKSC 42, SC), the Second Claimant's claim for a statutory redundancy payment requires her to (a) have been the Respondents' employee (as opposed to a worker) and (b) to have been continuously employed for two years. The working arrangements as described by the Second Claimant were not likely to amount to a contract of employment because even on her account there was no obligation to give her work, there was only an obligation on her to work when she was told to do so. There was therefore no mutuality of obligation which is required for**

> **an employment contract. That weakness in the merits of her claim is relevant because it is unlikely she could succeed on this issue.**
>
> **ln these circumstances and weighing up these factors I conclude that it is not just and equitable that the Second Claimant should be paid a statutory redundancy payment and therefore cannot bring her claim outside the usual 6 months time limit, taking into account the weakness of that claim and the above findings of fact about the Second's Claimant's delays in bringing this claim when she was in a position to do so much earlier than she did."**

4. It can be seen that the primary reason for the tribunal refusing to extend time on just and equitable grounds was its negative view of the merits of the claim for a redundancy payment. The tribunal formed the view, based on the account of her "employment" given by the appellant, that she was "not likely" to have had a contract of employment with the respondents and that her claim to a redundancy payment was "unlikely" to succeed.

5. My reasoning when giving permission to appeal against this ruling was as follows:

> **"[The tribunal's ruling] turned on whether it was just and equitable for the Appellant to receive a redundancy payment and the Tribunal held not, because of her delay in making her claim and because she did not have a contract of employment. The latter finding was said to have been based on the Appellant's own account, which revealed that there was no obligation upon the Respondent to give her work but only an obligation on her to work when she was told to do so. This meant, according to the Tribunal, that there was no mutuality of obligation and so no contract of employment (§28). It is arguable, in my judgment, that the Tribunal erred in drawing this factual conclusion from the account given in the Appellant's ET1 (she did not give oral evidence). It is also arguable that even if that were a fair reading of the facts alleged in the ET1, the Tribunal erred in law in concluding on that basis that there was no contract of employment and therefore that a claim for a redundancy payment was unfounded. It is not self-evident that an obligation on the claimant to perform work when it was allocated to her (or when her husband was not available to perform it) would be insufficient to give rise to a contract of employment either over the entirety of the relevant period or during periods when she was in fact working. Arguably, this was a matter which required a full investigation of the facts and should not have been relied upon as a basis for refusing to admit the claim for a redundancy payment.**
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> **It may be that the Tribunal would still not have permitted the claim for a redundancy payment to proceed because of the Appellant's delay on its own, but I note that in relation to her claims of sex discrimination and**

> **discrimination based on marital status the Tribunal extended time on just and equitable grounds where the delay was identical, but where the Tribunal was more convinced of the merits of the claims (§§37-39).”**

6. The respondent opposed, but did not participate in, the appeal, so the arguments on the appeal were essentially the same arguments as had been canvassed at the preliminary hearing, to which the respondent had not been invited.

7. The first question which arises on the appeal is whether the tribunal erred in law in deciding that, based on her own account, the appellant was unlikely to establish mutuality of obligation, and therefore unlikely to establish that she was employed under a contract of employment. The “account” in question must be that in her ET1 as she did not give oral evidence at the tribunal hearing. The relevant parts of the ET1 appear to have been drafted by the appellant herself and do not address the legal question of whether she was an employee. The following extracts from the ET1 seem to me to be the most material to that issue:

> **"... I have not been paid for the work I did since 01/09/2015 to 29/12/2020... I was not paid any wages for my work. I was working about 13 hours per day, 6 days a week... The Respondents knew that I had no right to work in the UK but this suited the Respondent because it ensured that I could not go out of the grounds to work which meant I could work for them within the grounds of Oak Hill Farm. . . I had to obey every order of Mm Rai."**
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> **"...I have worked on average of 13 hours a day 6 days a week. I had no set time for starting and leaving. Sometimes I have start at 6.30am to prepare breakfast for the Rai family. I had to cook lunch for the children to take to their office. I would finish work at night sometimes at 8.30pm, 9pm, 9.30pm and sometimes at 10pm".**
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> **". . . My duties as domestic worker are cleaning, cooking, gardening, dog-handling, shopping, security guard, caretaking, and hair dying Mrs Rai's hair. I worked hard and long hours".**

8. Essentially, what the appellant alleges is that she was required to work extremely hard to complete tasks which her husband, whom – the Respondents accept – was employed by

them, was not available, or able, to undertake, as well as some tasks which her husband was apparently not expected to perform, such as dyeing Mrs Rai's hair.

9. Against that background, I have concluded that the tribunal erred in law in its primary finding on the "just and equitable" extension application, that the appellant was unlikely to establish that she had a contract of employment with the respondents, for the following reasons:

(1) Whilst the existence of mutuality of obligation to offer and to accept work is undoubtedly one of the factors which may be considered when seeking to identify a contract of employment, it is not, generally, a necessary condition of a contract of employment. Rather, the correct approach is to consider a range of factors in the round (as in the classic case of *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497). In the case-law, lack of mutuality of obligation has frequently been relied upon to distinguish between an employee and a casual worker, who may or may not be offered work and may or may not decide to accept it if it is offered. The appellant's situation was, on her account, far removed from that of a casual worker and it is far from self-evident that mutuality of obligation would be a key factor in seeking to identify a contract of employment in her case.

(2) Even assuming that mutuality of obligation were to be a significant matter in this case, there is at least some authority that lack of mutuality of obligation will only exist where there is an absence of obligation both on the alleged employer to offer work and on the alleged employee to accept work if offered (see *Wilson v Circular Distributors Ltd* [2006] IRLR 38). On the appellant's account, there can be little

doubt that she was obliged to perform the work which she was asked or told to perform and, applying *Wilson*, that would be sufficient to deal with a defence based on lack of mutuality of obligation. I need not, and do not, decide whether *Wilson* remains good law and, if so, what its effect would be in this case. Rather, I highlight this line of authority as a reason why the tribunal should not have summarily concluded that the appellant would be unlikely to demonstrate a contract of employment.

(3) The tribunal was not justified in drawing from the appellant's account in her ET1 the conclusion that the respondents were under no obligation to give her work. At most it might be said that her ET1 is silent on that issue. It does not, in my judgment, describe her position in terms which state or imply the conclusion that the tribunal reached. It describes a position where, on her account, the appellant had very little choice in her living and working conditions and certainly did not have the scope for self-determination which would usually characterise a casual relationship falling short of employment. Indeed, given that the respondents did employ the appellant's husband, with sufficient mutuality of obligation, and (on her account) the appellant's role was to perform work alongside or instead of him, it may be a more natural conclusion to draw from the ET1 that there was sufficient mutuality of obligation in her case as well. In any event, this is an issue which required a detailed factual investigation, including on the basis of oral evidence, and it should not have been summarily determined against the appellant in this way.

10. The next question is whether the tribunal's error of law on its primary finding was sufficiently material to its final decision as to warrant overturning its refusal to grant a just

and equitable extension. In my judgment, it was, for the reasons I gave when granting permission to appeal. Whilst the tribunal also relied upon the appellant's conduct and her contribution to the delay in presenting the claim, it granted a just and equitable extension for her claims for sex discrimination on account of marriage and race discrimination notwithstanding the same conduct and a significantly longer delay after expiry of the relevant time limit before the claim was presented (as the primary time limit for those claims is three months as opposed to six months for the redundancy payment claim). It is, therefore, eminently possible that the tribunal would have granted an extension of time for the redundancy payment claim but for its erroneous conclusion regarding the merits of the claim.

11. Accordingly, I allow the appeal and remit the appellant's claim for a redundancy payment claim to the tribunal. I understand that the appellant's sex and race discrimination claims have been listed for hearing before the tribunal and it may well be convenient for the redundancy payment claim to be heard alongside these other claims.