

Appeal No. UKEAT/0340/09/CEA

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 14 October 2009

Before

THE HONOURABLE MR JUSTICE BURTON

(SITTING ALONE)

METROPOLITAN BOROUGH COUNCIL OF CALDERDALE

APPELLANT

MS P WELLS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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(of Counsel)
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Council Legal Services
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For the Respondent

MR ANDREW SUGARMAN
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SUMMARY

JURISDICTIONAL POINTS

Continuity of Employment

No arguable basis for case of perversity by ET in finding that the Claimant was employed for the academic year notwithstanding the wording of a box included in her monthly claim form. Appeal dismissed with costs.

THE HONOURABLE MR JUSTICE BURTON

Introduction

1. This has been the hearing of an appeal by the Metropolitan Borough Council of Calderdale (“the Appellant”) against the judgment of Employment Judge Woodward, in Reasons sent to the parties on 2 June 2009 after a hearing in Leeds on 7 May 2009, that the Claimant (now Respondent) had sufficient continuity under the **Employment Rights Act 1996** (“the 1996 Act”) to make a claim for unfair dismissal and/or a redundancy payment. This was heard by way of a preliminary issue at a Pre-Hearing Review.

2. It is common ground that the only relevant statutory provision to which I need to pay regard is s212 of the 1996 Act, which provides:

“(1) Any week during the whole or part of which an employee’s relations with his employer are governed by a contract of employment counts in computing the employee’s period of employment.

(3) ... any week ... during the whole or part of which an employee is:

(a) incapable of work in consequence of sickness or injury,

(b) absent from work on account of a temporary cessation of work,

(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose

counts in computing the employee’s period of employment.”

The Facts

3. The Claimant in this case was employed by the Appellant, as a teacher at Christchurch School. She was employed effectively full-time until 2000, and then between 2000 and 2004 she worked occasional days on an ad hoc basis. In October 2004 the situation changed again and, as was confirmed by a letter from Mrs Priestley, the then Head Teacher, who, in due course, gave oral evidence at the hearing, there was a new arrangement by which the Claimant was employed half a day per week to cover planning, preparation, planning and assessment

time. She taught numeracy, literacy and Personal Social Citizenship Health Education, and, from September 2005, Spanish instead of numeracy.

4. According to Mrs Priestley, the arrangement was reviewed each year for the following academic year and she gave evidence according to her witness statement, which said this:

“13. The days Mrs Wells was required to work were agreed at the start of the academic year in order to suit the timetable. From October 2004 to July 2005, this was a Monday. From September 2005, this changed to a Wednesday and this arrangement was still in place when I retired in April 2007.

14. I reviewed the arrangement each year for the following academic year until my retirement.”

5. After Mrs Priestley’s retirement, Mrs York took over in April 2007 and, as the Tribunal found at paragraph 3.6 of the Employment Judge’s judgment, Mrs York:

“... did not seek to vary the agreement that the Claimant agreed with Mrs Priestley. In or about July 2007, Mrs York asked the Claimant if she would be available to work a full day from September 2007. In her statement, she stated that she negotiated with the Claimant to enquire as to whether she would be available to work the whole day on Wednesdays from September 2007 both on a week by week basis and still on a supply basis. The Claimant denied this. Employment Judge Woodward concludes on a balance of probabilities that Mrs York did not make any reference to the basis upon which the Claimant would be employed the following year. There was no need for Mrs York to have referred to the basis upon which the Claimant was employed as there was no material change to the arrangements with the exception of an increase in hours ...”

6. The Employment Judge then records Mrs York’s acceptance that:

“... with the exception of the last week of term, she never discussed with the Claimant whether she would be coming into work the following week and expected that she would. Mrs Priestley was clear on this issue: if the Claimant had not attended for work each week, she would have been surprised and annoyed. As in previous years, the Claimant’s week’s absence in February [that is the holiday that she was entitled to take during term time once a year] was agreed before the academic year started.”

7. It is common ground that, in respect of the period from October 2004 until the relationship ended in March 2008, the Claimant worked throughout the term on one day a week, latterly Wednesday, during term time. Consequently, when the school was closed in the school holidays, she was not required to attend for work; ditto when there was half term.

Additionally, on one occasion, she had a week off through illness. Otherwise, there was simply the one week holiday a year in February which she took, by arrangement, during term time.

8. The Appellant relied on a document which is headed up “Monthly Casual Supply Salary Claim - Teacher/Instructor”. Although it is there described as a monthly supply salary claim and consequently was filled out monthly, the Appellant’s case before the Tribunal and on appeal before me was that the Claimant was employed on a casual daily basis and there is a note on the right-hand side of this form in a box which says:

“Please note you are employed on a casual daily basis and your contract of employment finishes at the end of each day.”

9. That was on the right-hand side of the form, as I have indicated, in a box, but was not specifically signed by the Claimant. The vast bulk of the box related to the form filled out monthly by the Claimant herself with her name, address, the name of the school, which month it was she was claiming for, whether she held a part-time election to the teachers’ pension scheme and the days on which she had worked, with a signature at the bottom and a countersignature by the Head Teacher. The Employment Judge referred to this as the “time sheet”.

10. By reference to that document and, to an extent, by reference to the evidence of Mrs York which, as I have indicated, the Employment Judge did not accept, the submission by the Appellant before the Tribunal was that the Claimant was a daily casual worker, that her contract of employment, which they conceded there was, was only by the day, and came to an end at the end of each day. If one ignores the school holidays and the agreed week’s holiday in February during term time, that can effectively be construed as 52 separate contracts of employment of a day’s duration. The submission by the Appellant was consequently that there was no sufficient

continuity of employment, notwithstanding the terms of s212, to constitute an entitlement to claim unfair dismissal or redundancy.

11. The finding by the Employment Judge was that there was in fact a one-year contract, that is for the duration of the academic year, starting at the end of September and ending in the middle of July of each year. It appears that Mr Sugarman for the Claimant contended also, or in the alternative, for what one might call an ‘umbrella’ contract of permanent employment from year to year, but it was not necessary for the Claimant’s case to succeed in that regard, and that was not the finding by the Tribunal Judge, nor is there any cross appeal or respondent’s notice to seek to argue that before me today. Suffice it that Mr Sugarman submits that the findings of the Employment Judge were correct in so construing the employment situation.

12. It is common ground between Counsel before me that, whether by reference to **Fitzgerald v Hall Russell & Co** [1970] AC 984 (HL) or otherwise, in construing the employment relationship, all factors must be looked at.

13. As to whether one looks any further than the “time sheet”, at the bottom of which there is a signature by the Claimant, it is clear that firm submissions were made to the Tribunal by Mr Hardy, who appears before me, as he appeared below, in that regard. Reference was made both to the Tribunal and before me to the decision of **Protectacoat Firthglow Limited v Szilagyi** [2009] IRLR 365, a decision of the Court of Appeal. This was a case in which the facts were somewhat different from this, in the sense that there was actually what purported to be an agreement signed by the parties – in that case a services agreement and a partnership agreement. In that case the employment judge concluded, by reference inter alia to the well-known tax case of **Snook v London & West Riding Investments Ltd** [1967] 2 QB 786, that the agreements so signed were a sham, and consequently did not reflect the intentions of the

UKEAT/0340/09/CEA

parties and fell to be disregarded. The appeal was on the basis that there was no evidential foundation for concluding that all parties to the partnership agreement and the service agreement had the common intention found by the Tribunal that the acts or documents were not to create the legal rights and obligations which they gave the appearance of creating, and that therefore the employment judge had erred in law in finding that the arrangements were a sham. The Court of Appeal dismissed the appeal.

14. It seems to me clear that the facts in that case were *a fortiori* to the present, because the parties, on the face of it, had agreed that the documents in question reflected or should constitute the proper account of the relationship between the parties. Smith LJ, in her judgment, realised that she had to address such document and in paragraph 51 described the suggestion that terms were “solemnly agreed in writing” as being **“more redolent of a commercial agreement reached between two parties of equal bargaining power than the kind of ‘take it or leave it’ situation which can prevail in some agreements in the field of work.”**

15. At paragraph 56, she said:

“While a document which can be shown to be a sham designed to deceive others will be wholly disregarded in deciding what is the true relationship between the parties, it is not only in such a case that its contents cease to be definitive. If the evidence establishes that the true relationship was, and was intended to be, different from what is described in the document, then it is that relationship and not the document or the document alone which defines the contract.”

and at paragraph 61, comparing a dispute as to whether a contractual document creates a licence or a tenancy:

“The court must look at the substance and not the label.”

16. Notwithstanding that the parties had purportedly agreed that the documents in question did reflect the agreement between them, the Court of Appeal found that the Employment
UKEAT/0340/09/CEA

Tribunal had been entitled in that case to disregard them, and concluded that they did not accurately reflect the real relationship between the parties.

17. The present case is nothing like that strong. Of course, absent any other evidence, the document signed by the Claimant is, and would be, considerable contemporaneous evidence of what the relationship between the parties was. The box on the right-hand side is obviously what is significant. Otherwise, it is simply a claim form reflecting a requirement of an auditing kind for a teacher to set out the hours worked. Absent any other evidence, no doubt that would be of considerable significance, particularly if the Claimant had, for example, in the course of evidence accepted that she had seen and read the box, but put forward some explanation as to why she had understood it differently.

18. Similarly, if there had been some evidence of action or statements by her by reference to the document, no rule about the priority of written evidence over oral evidence would have prevented consideration of the totality of the evidence before the Tribunal. Indeed, as I have indicated, such consideration would have been required.

19. There was however no evidence to that effect. Not only was there no evidence of any discussions or actions by the Claimant consistent or inconsistent with the document, but there was a specific finding by the Employment Judge who had the opportunity of hearing the oral evidence. That is recorded in paragraph 3.4 of the judgment:

“The Claimant completed what were described in evidence as ‘timesheets’ each day recording the dates worked ... These were kept in the school office and were submitted for payment each month after they had been countersigned by the Head Teacher. Supply teachers engaged on an ad hoc basis or to cover periods of sickness or maternity leave also claimed payment in this way. The document includes a small box [and the contents of that box are set out]. The Claimant stated that she had not noticed the contents of that box when she signed the form. Employment Judge Woodward accepted the Claimant’s evidence on this point in light of the lack of prominence of the box, the fact that the Claimant was never provided with a copy of the document to retain for her consideration and the fact that the box does not appear in either of the sections that the Claimant was required to complete and is located above a box headed ‘For Office Use’.”

20. It is that finding which Mr Hardy must attack as being perverse if he is to get anywhere in relation to this appeal. The other facts that are recited by the Employment Judge are all significant including paragraph 3.5 which records:

“In July 2005, it was agreed between Mrs Priestley and the Claimant that the Claimant would work at the school for the following academic year. The Claimant agreed to teach Spanish as part of the modern foreign language programme in place of numeracy. She was the only teacher teaching this subject and was solely responsible for the ordering of resources, planning and delivery of lessons and the writing of end of term reports. It was agreed that the Claimant would work a half day on Wednesdays from September 2005 rather than Mondays as this was more convenient to the school. Mrs Priestley agreed to allow the Claimant to take a week’s holiday during term time in February 2006 in the same way as she had agreed to this in the previous year ... With the exception of the week in February and the times when the school was closed for holidays, it was agreed that the Claimant would provide regular and reliable attendance each Wednesday and that the Respondent would pay her for this.”

I have already recited the relevant parts of paragraph 3.6.

21. The Employment Judge concluded in paragraph 5.4 that the Claimant’s relationship with the Applicant was governed by a contract of employment during each academic year. That is based upon the findings of fact, the most important aspects of which I have already cited, and her conclusions in paragraph 5.2:

“The Claimant was engaged by the Respondent to work as a teacher for the duration of the academic year. During each engagement, there was mutuality of obligation while the engagement was in force. The Claimant agreed to teach at the school each and every week during the academic year ... The Respondent agreed to pay her for that work. No further agreement was required and no discussions took place on a week by week basis as to whether the Claimant was required or whether the Claimant was prepared to work the following week. Despite the words on the “timesheet” signed by the Claimant and head teacher submitted each month for payment, the parties to the agreement understood that unless the arrangement was terminated by either party, the Claimant would work at the school for the duration of the academic year.”

22. Those conclusions are firmly based upon the facts that were before the Employment Judge. In my judgment, the Judge did not need to address the “timesheet” in the way that the court needed to address the services agreement in **Protectacoat**, because this is not a case of an agreement inaccurately reflected in a *solemn* document, but of the “timesheet” being one of the pieces of evidence, albeit persuasive but for the fact that the Claimant gave evidence, which the

Tribunal accepted, that she did not notice the box. So it is in that context, having made the findings of fact that she did, that the Employment Judge did then proceed to deal with the timesheet, and concluded:

“... that the “timesheet” did not, nor was it intended to, represent the true intentions of expectation of the parties; see Protectacoat. This document which was designed for use by supply teachers was used by the parties in this case as a matter of expediency and did not reflect the true relationship between the parties.”

Conclusion

23. I can see no basis upon which it begins to be arguable that the conclusions, whether of fact or law, in that regard by the Employment Judge were perverse. There was plainly evidence upon which she was entitled to reach the conclusion that she accepted the Claimant’s evidence and that part of Mrs Priestley’s evidence which I have recited, at paragraphs 13 and 14 of her witness statement. She did not accept the evidence of Mrs York, as she states in paragraph 3.6 of her judgment, cited above, and there was nothing in Protectacoat (indeed the reverse) which prevented the Employment Judge from reaching the conclusion she did and, in any event, had she chosen to do so, she could have pointed out that the facts in Protectacoat were more counter-indicative of employment than the evidence before her, and yet the Court of Appeal in Protectacoat still upheld the decision of the Employment Tribunal.

24. In those circumstances, I can find no basis to disagree with the Employment Tribunal Judge’s findings on the evidence before her, and *a fortiori* cannot begin to find that the decision was one that was not open to her or was one which can be categorised in any way as perverse. It only makes the life of Mr Hardy more difficult that, had he succeeded in overturning the conclusion of the Tribunal that there was an academic year contract of employment, he would still have had the difficulty of dealing with the case that even if this was a series of contracts of employment each week, unbroken by virtue of the provision, of s212(3)(a), (b) and (c) (sickness, school holiday and agreed week off respectively), then that would have still fallen

within the provisions of s212(1), because the legislation does cover “**any week during ... part of which an employee’s relations with his employer are governed by a contract of employment**”, i.e. not necessarily the same contract, but even if it be a different contract of employment each week.

25. That was not found by the Tribunal, and it is not necessary for Mr Sugarman’s argument, but I am entirely satisfied that that itself would have stood in the way of Mr Hardy, and, in that regard, I found it impossible to see that there was any basis for distinguishing the conclusions (albeit not binding on me) of Elias P, as he then was, in **Vernon v Event Management Catering Ltd** UKEAT0161/07/LA in a judgment of 2 July 2007, in which he concluded that, notwithstanding the absence of an umbrella contract:

“The effect is that if the employee works for the whole or part of any week then that entire week should count for the purposes of continuity of employment. This is irrespective of how many hours are worked. Conversely, if the employee does not work at all in that week, then that week cannot count under this subsection. If it is not to break continuity, that has to be as a consequence of other continuity provisions.”

26. Had Mr Hardy succeeded in establishing perversity on the part of the Employment Judge in concluding that this was an academic year contract, then he would have had, in my judgment, an impossible task of answering what one can call the **Vernon** point, given that, upon the findings of fact by the Tribunal, every break in continuity, on the assumption that they were a separate contract each week, were well-covered by one or other of the subparagraphs of paragraph 212(3).

27. As I have indicated, I do not need to deal with that argument. Whether there would have been the need for remission to consider whether there was, or could be a finding of, **Vernon**-style continuity, I also do not need to consider, because I have already decided that the Employment Judge’s decision can be upheld in the terms in which it was made. The conclusion

which the Employment Judge reached that there was a contract of employment for the academic year is unchallengeable in law.