Appeal No. UKEAT/0050/19/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 September 2019

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

TALASH HOTELS — APPELLANT

MR R SMITH — RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2019

APPEARANCES

For the Appellant	MR RICHARD MORTON (Solicitor) Avensure Ltd South Central 11 Peter Street Manchester M2 5QR
For the Respondent	MR RICHARD SMITH (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE – Right to be heard

The Respondent's ET 3 in response to a claim for unlawful deduction of wages and holiday pay was lodged six days out of time. An ET refused to extend time and held that judgment be entered, and that the Respondent could be permitted to participate in any hearing only to the extent permitted by an Employment Judge.

The Claimant was asked to and did produce details as to the computation of his claim. This was not copied to the Respondent by the ET, which went on to make a default judgment of £4,615.38 by way of unauthorised deductions, and £5,769.21 representing a failure, "to pay the Claimant's holiday entitlement." A different Employment Judge refused to reconsider the matter, and also refused to give reasons.

The Claimant had not kept a copy of the material he provided to the ET, and the ET refused to provide the Respondent with a copy, no reasons for this refusal being given.

In **Office Equipment Systems Ltd v Hughes** [2018] EWCA Civ 1842 the Court of Appeal held that it would generally be wrong for an ET to refuse to read any written representations or submissions as regards remedy sent to it by the defaulting respondent. It also held that where then computation of loss was not straightforward only an exceptional case would justify an ET excluding the respondent from participating in any oral hearing. It should be rarer still for a tribunal to refuse to allow the respondent to make written representations on remedy."

The EAT held that the refusal to provide the Respondent with the opportunity to comment on the Claimant's computations was an error of law on the ET's part. It commented that the refusal to reconsider the decision and/or to provide reasons as to how the awards were calculated offended both common sense as well as basic fairness and justice.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is the Full Hearing of an appeal which was permitted to progress to a Full Hearing by His Honour Judge Auerbach at the sift stage. It concerns a decision by an Employment Tribunal ("the ET") sitting at Birmingham, Employment Judge Hughes sitting alone, to make an award to the Claimant of £4,615.38 by way of unauthorised deduction, and £5,769.21 representing a failure, "to pay the Claimant's holiday entitlement." The judgment was expressed to be pursuant to Rule 21 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**.

2. By his claim the Claimant, who had been employed by the Respondent for 29 weeks between 25 November 2017 and 12 May 2018, the claim was that he was working on average 60 hours per week, more than his contracted hours without pay, and that, therefore, he was working for less than the national minimum wage. It was also said that he had 15 days unpaid holiday entitlement when he left the Respondent.

3. A response was lodged six days late. It asserted that the Claimant had paid all monies due and owing to him. An application was made for extension of time. This was refused by letter of 16 August 2018, the Tribunal noting that:

> "…..
>
> **Employment Judge Camp has refused the application for an extension of time because the respondent has provided no explanation whatsoever, not even a bad one, for why the response was not presented on time. Moreover, the response form consists of little more than a bare, unparticularised denial of the claimant's claim.**
>
> ….."

With respect to the Judge, it is hard to see how more particularised the response could be than that all sums alleged to be owed had been paid. However, that is by the by.

4. The letter concluded that:

> **"…. A judgment may now be entered and you will only be permitted to participate in any hearing to the extent permitted by the Employment Judge.**
>
> **……."**

5. A further letter of the same date was sent to the Claimant and copied to the Respondent asking him for written details as to how his claim was calculated. The Claimant did indeed respond to the ET but this was not copied to the Respondent, and the ET did not forward to the Respondent such information as had been provided. The Claimant told me today he did not keep a copy. The Respondent has been unable to get a copy from the ET despite requests. The Claimant told me today that his claim was based on an average. He said that whilst working the Respondent operated a clocking in and out system using a fingerprint touch, and he assumed that a full record of hours would be printed out and made available to the Tribunal.

6. The default judgment then followed. A request was made for reconsideration. This was refused by a different Employment Judge, Employment Judge Woffenden, with no reasons being given. A request for reasons was also refused on the basis that this was a judgment under Rule 21.

7. In writing to the Tribunal, the Respondent had made reference to the case of **Office Equipment Systems Ltd v Hughes** [2018] EWCA Civ 1842, a decision of a court comprised of Underhill LJ and Bean LJ, both eminent employment lawyers. At paragraphs 19 and 20 of that judgment Bean LJ said as follows:

> **"19. There is no absolute rule that a respondent who has been debarred from defending an employment tribunal claim on liability is always entitled to participate in the determination of remedy. At the lower end of the scale of cases employment tribunals routinely deal with claims for small liquidated sums, such as under Part 2 of the Employment Rights Act 1996 (still commonly called the "Wages Act" jurisdiction) where liability and remedy are dealt with in a single hearing. In such a case, a respondent who has been debarred from defending under Rule 21 could have not legitimate complaint if the employment tribunal proceeds to hear the case on the scheduled date, determines liability and makes an award. Even in that type of case it would generally be wrong for the tribunal to refuse to read any written representations or submissions as regards remedy sent to it by the defaulting respondent in good time, but proportionality and the overriding objective do not entitle the respondent to a further hearing."**

8. Paragraph 20:

> **"But in a case which is sufficiently substantial or complex to require the separate assessment of remedy after judgment has been given on liability, only an exceptional case would justify excluding the respondent from participating in any oral hearing; and it should be rarer still for a tribunal to refuse to allow the respondent to make written representations on remedy."**

9. It seems to me as plain as can be that the ET in this case erred in law in allowing no participation whatsoever by the Respondent at the remedy stage. It failed to notify the Respondent of the material that had been received, and, therefore, inferentially failed to allow representations. As I have indicated above, even the Claimant, Mr Smith, expected there to have been input from the Respondent in the form of a definitive statement of his working hours. His claim had, to an extent, been based on averages.

10. Before me today, Mr Morton for the Respondent pointed out that the Tribunal awarded £5,769.21 as holiday pay based on a 15 days' claim. That equates to £384 per day of holiday pay, considerably more a weekly wage, bearing in mind the claim was that the Claimant was in effect working for less than the minimum wage. The overtime claim calculates as being based on 21 hours per week, over and above the contracted hours for the full 29 weeks worked.

11. The notion that such an extraordinary outcome in relation to holiday pay alone should not be reconsidered by a Tribunal or that reasons should not be given explaining how it was calculated, offends both common sense as well as basic fairness and justice. I should add that attempts were made at the sift stage by the then President, Simler J, for this matter to be resolved by the Tribunal by use of the **Burns/Barke** procedure, seeking to ask questions of the Employment Judge, but this proved unsuccessful, hence the matter having to be sent for a Full Hearing, necessitating considerable delay.

12. Accordingly, I quash the judgment of Employment Judge Hughes and direct that a Remedy Hearing be held in a form to be decided by a new Employment Judge appointed by the Regional Employment Judge, but allowing the Respondent to participate meaningfully in that process. I further direct that the ET is to provide forthwith to the Respondent copies of the documentation which was provided to it by the Claimant, alternatively to provide the Respondent with a written explanation as to why this is not possible.

13. Given the lapse of time before any hearing can take place, I would urge the parties to seek to settle this matter. As a minimum I would expect the Respondent to provide the Claimant with a printout from the fingerprint-based clocking in and out system which he mentioned today in an attempt to narrow the differences before any further hearing.