Appeal No. UKEAT/0371/09/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 7 January 2010
Judgment handed down on 23 February 2010

Before

HIS HONOUR JUDGE SEROTA QC

MS K BILGAN

MRS J M MATTHIAS

MR M BEBBINGTON APPELLANT

MISS J PALMER T/A STURRY NEWS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN CROSFILL (of Counsel) Instructed by: The Children's Legal Centre University of Essex Wivenhoe Park Colchester Essex C04 3SQ
For the Respondent	MR MICHAEL SALTER (of Counsel) Instructed by: Messrs Lyons Davidson Solicitors Park House 87 Burlington Road New Malden Surrey KT3 4QP

SUMMARY

JURISDICTIONAL POINTS: Worker, employee or neither

The Claimant, a newspaper boy, was not employed under a contact of employment, on the facts found by the ET s. 18 of the **Children and Young Persons Act 1937** does not provide that a child employed in accordance with the statute is to be regarded as an employee.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Claimant through his father as litigation friend from a decision of the Employment Tribunal at Ashford (Employment Judge Salter and Lay Members) dated 25 February 2009. The Reasons were sent to the parties on 13 March 2009. The Employment Tribunal dismissed the Claimant's claims for unfair dismissal, breach of contract and age discrimination. It found that the Claimant was not employed by the Respondent. The claim of age discrimination was not in fact pursued.

2. The Appeal was initially disposed of under Rule 3(7) of the **Employment Appeal Tribunal Rules of Procedure** by HHJ Peter Clark but the Claimant made a successful application under Rule 3(10) to HHJ Ansell who referred the appeal to a full hearing.

The facts

3. We have taken these facts largely from the decision of the Employment Tribunal. At the relevant time the Claimant was a paper boy aged 14 and 15; he attended school. At the age of 14 he began doing a paper round for Mr Cole who was then the proprietor of Sturry News, a newsagent in Sturry, Canterbury. The Claimant's intention was to work as many other paper boys do to supplement his pocket money until he reached the age of 16 when he would be able to get a job in a supermarket. The Respondent is now the proprietor of Sturry News having acquired the business from Mr Cole in November 2006. Mr Cole had obtained the necessary permit to enable him to employ children and the Respondent received the relevant permit when she acquired the business in November 2006.

4. The arrangement between the Claimant and Mr Cole was entirely verbal. He received £18.00 per week. If he did not work, he was not paid. He was given a bag to enable him to deliver newspapers during the week and a trolley to enable him to deliver newspapers at weekends. During the week he would use his bicycle. The round involved a modest number of households only (12 or 13 I believe) and it took him significantly less than an hour each day.

5. When the Respondent acquired the business she asked whether any staff would be transferred and told that there were none but there were some six paper boys who were "casual workers". The paper boys continued to work for the Respondent. For various reasons by the time this dispute arose the number of paper boys had been reduced to two (including the Claimant).

6. Latterly the Claimant received payment of £20.00 per week, his pay having increased when he undertook additional deliveries. When the additional deliveries ceased his pay remained at £20.00 per week.

7. The Employment Tribunal set out the essential features of the relationship between the Claimant and the Respondent at paragraph 6:9 and 6:10.

> **"6.9 The arrangement between the parties was that the Respondent paid the Claimant for such days as he worked. The Respondent was under no obligation to provide the Claimant with work. If, for example, newspapers were not delivered to the shop the Claimant would not have been able to do the round and would not have been paid. When the respondent suggested to the Claimant that he took Sundays off because he was looking tired he did so and was not paid. The Respondent was under no obligation to pay the Claimant when he was sick nor when he was on holiday. There were no agreed holidays. The Respondent had no disciplinary or grievance procedure that could be applied. If the Claimant attended the shop to do the round he was required to deliver the newspapers in accordance with the Respondent's instructions. He could take what time he chose. Apart from providing him with a bag in which to carry the newspapers there was no other equipment required. The Claimant either made the round on his bicycle or by using the trolley.**
>
> **6.10 The Claimant regularly turned up to do the round but there were times when he did not do so. If for whatsoever reason the Claimant was unable to work on the round he was not paid for example when he took Sundays off or, as happened from time to time, when he failed to turn up during the week and his round was covered by his colleague. As a**

matter of courtesy he was expected to telephone to warn the respondent that he was unable to attend. He usually arranged with someone else to do the round on his behalf and be paid. The Respondent was not concerned whether the Claimant attended to do the round, or whether he sent somebody else or whether he did not turn up at all and did not call to say that he was not coming which was often the case with the Claimant and other paper boys. In the latter event she made her own arrangements either asking the delivery van driver, her or somebody else to do the round."

8. On 16 August 2008 the Claimant and the other paper boy were asked to be at the shop at 6.30am although they were not expected to work from that time because deliveries would start at 7.00am only. This was the earliest time permitted by the Respondent's Child Employment Permit. The Claimant informed his parents and the Claimant's mother, who misunderstood the position, attended the shop and informed the Respondent her son would not work before 7.00am and that it was unlawful to expect him to do so. She threatened the Respondent with a reference to the Tribunal. It is apparent that tempers were raised and the altercation (as the Employment Tribunal described it) resulted in the Claimant ceasing to work for the Respondent. Although an offer was made by the Respondent to re-employ the Claimant his parents decided that he would not go back to work for her.

Proceeding before the Employment Tribunal

9. The Claimant was represented by his father at the Employment Tribunal. Mr Bebbington Senior is not a lawyer but it is quite clear that he and Mrs Bebbington feel extremely strongly about this matter. They had been in touch with the Children's Legal Centre at Essex University. Mr Bebbington Senior referred the Employment Tribunal to Article 2.2 of the United Nations **Convention on the Child** (November 1989), the **Minors Contract Act** 1987, Kent byelaws on the **Employment of Children 1998** and Section 21 of the **Children and Young Persons Act 1933**. The Claimant claimed a total of £3,672.50 to include a claim for damages of £2,000, of which he would wish to donate £1,000 to ChildLine.

10. The Employment Tribunal set out the facts as we have described them. It directed itself as to section 230 (1) and (2) of the **Employments Right Act 1996** and to the relevant authorities of **Carmichael v National Power [**2000] IRLR 43, **Ready Mix Concrete v The Minister of Pensions and National Insurance** [1968] 2 QB 497 and **Montgomery v Johnson Underwood Limited** [2001] IRLR 269.

11. The Employment Tribunal correctly directed itself that mutuality of obligation and the requirement of control on the part of the potential employer were the irreducible minimum of the existence of a contract of employment. It went on to say at Paragraph 9:

> **"9 The obligation to render *personal service* is of crucial importance in determining whether an individual works under a contract of employment. If a worker is entitled to substitute for his or her personal service that will usually be enough to demonstrate that it is not a contract of service by reason of the absence of the irreducible minimum obligation. The lack of personal service is not necessarily conclusive and will be affected by whether the right o delegate work was fettered in any way."**

12. The Employment Tribunal then concluded that there was no contract of service between the Claimant and the Respondent. As the Claimant was not employed he could not claim he had been dismissed unfairly or wrongfully.

13. The reasoning of the Employment Tribunal is to be found in paragraphs 11 and 12.

> **"11 The question is whether there was a mutuality of obligation. The Claimant was under no obligation to work his newspaper round. If he had been under such an obligation, any failure to attend to the round could have resulted in a sanction or disciplinary procedure against him. The reality of the situation was that, if he chose not to do the round, he could either send somebody else to do it for him or phone the Respondent who would arrange for someone else to do it or indeed not call at all in which case the Respondent made her own arrangements for the round to be done by someone else. If the Respondent did not need the Claimant to do a round she could tell him not to attend and she would not be obliged to pay him. In such circumstances the Tribunal is unable to find a mutuality of obligation. In other words there is no obligation on the part of the Claimant personally to work set hours each week in return for a weekly wage.**
>
> **12 Nor were there any other terms agreed between the parties that were consistent with a contract of service; the Claimant was not subject to any disciplinary policy nor was there any provision for raising grievances; he was not entitled to be paid during illness or holiday nor was any period of holiday agreed and the Claimant could have taken such holiday as he wanted. In addition the Claimant was paid cash, provided his own means**

of transport and a trolley and within reason could take such time as he wished to deliver the newspapers and it made no difference to the amount he was paid."

14. As we have noted the claim in respect of age discrimination was not pursued because there had been a misunderstanding on the part of the Claimant's parents as to the law.

15. The law as to the distinction between a contract of service and contracts of services is not controversial. We do not need to add to the number of cases on the subject and will confine ourselves to short citations from **Ready Mix Concrete** and **Carmichael**. In **Ready Mix Concrete v Ministry of Pensions and National Insurance** [1968] 2 QB 497; McKenna J had this to say at page 515:

> **"I must now consider what is meant by a contract of service.**
>
> **A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."**

16. In **Carmichael v National Power** 1999 ICR 1226 Lord Irvine of Lairg LC had this to say at page 1230:

> **"If this appeal turned exclusively - and in my judgment it does not - on the true meaning and effect of the documentation of March 1989, then I would hold as a matter of construction that no obligation on the C.E.G.B. to provide casual work, nor on Mrs. Leese and Mrs. Carmichael to undertake it, was imposed. There would therefore be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service"** *(Nethermere) (St. Neots) Ltd v Gardiner* **[1984] ICR 612, 623c-g, per Stephenson LJ, and** *Clark v Oxfordshire Health Authority* **[1998] IRLR 125, 128, per Sir Christopher Slade, at para. 22).**

17. Insofar as the appeal in this case is based on perversity we have of course have in mind the judgment of Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93 where he had this to say:

"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", *British Telecommunications PLC v Sheridan* **[1990] IRLR 27 at para 34.**

18. For the sake of completeness we set out s. 18 of the **Children and Young Persons Act 1933** in its entirety:

18 Restrictions on employment of children

(1) Subject to the provisions of this section and of any byelaws made there under no child shall be employed—

[(a) so long as he is under the age of [fourteen years]]; or

[(aa) to do any work other than light work; or]

(b) before the close of school hours on any day on which he is required to attend school; or

[(c) before seven o'clock in the morning or after seven o'clock in the evening on any day; or]

(d) for more than two hours on any day on which he is required to attend school; or

[(da) for more than twelve hours in any week in which he is required to attend school; or]

(e) for more than two hours on any Sunday; or

(f) …

[(g) for more than eight hours or, if he is under the age of fifteen years, for more than five hours in any day—

(i) on which he is not required to attend school, and

(ii) which is not a Sunday; or

(h) for more than thirty-five hours or, if he is under the age of fifteen years, for more than twenty-five hours in any week in which he is not required to attend school; or

(i) for more than four hours in any day without a rest break of one hour; or

(j) at any time in a year unless at that time he has had, or could still have, during a period in the year in which he is not required to attend school, at least two consecutive weeks without employment.]

(2) A local authority may make byelaws with respect to the employment of children, and any such byelaws may distinguish between children of different ages and sexes and between different localities, trades, occupations and circumstances, and may contain provisions—

(a) authorising—

[(i) the employment [on an occasional basis] of children [aged thirteen years] (notwithstanding anything in paragraph (a) of the last foregoing subsection) by their parents or guardians in light agricultural or horticultural work];

[(ia) the employment of children aged thirteen years (notwithstanding anything in paragraph (a) of the last foregoing subsection) in categories of light work specified in the byelaw.]

(ii) the employment of children (notwithstanding anything in paragraph (b) of the last foregoing subsection) for not more than one hour before the commencement of school hours on any day on which they are required to attend school;

(b) prohibiting absolutely the employment of children in any specified occupation;

(c) prescribing—

(i) the age below which children are not to be employed;

(ii) the numbers of hours in each day, or in each week, for which, and the times of a day at which, they may be employed;

(iii) the intervals to be allowed to them for meals and rest;

(iv) the holidays or half-holidays to be allowed to them;

(v) any other conditions to be observed in relation to their employment;

…

so, however, that no such byelaws shall modify the restrictions contained in the last foregoing subsection save in so far as is expressly permitted by paragraph (a) of this subsection, and any restriction contained in any such byelaws shall have effect in addition to the said restrictions.

[(2A) In this section—

"light work" means work which, on account of the inherent nature of the tasks which it involves and the particular conditions under which they are performed—

(a) is not likely to be harmful to the safety, health or development of children; and

(b) is not such as to be harmful to their attendance at school or to their participation in work experience in accordance with section 560 of the Education Act 1996, or their capacity to benefit from the instruction received or, as the case may be, the experience gained;

"week" means any period of seven consecutive days; and

"year", except in expressions of age, means a period of twelve months beginning with 1st January.]

[(3) Nothing in this section, or in any byelaw made under this section, shall prevent a child from [doing anything]—

(a) under the authority of a licence granted under this Part of this Act; or

(b) in a case where by virtue of section 37(3) of the Children and Young Persons Act 1963 no licence under that section is required for him to [do it].]

…"

The Appeal and Claimant's Submissions

19. The Claimant's case has been taken up by the Children's Legal Centre at Essex University and appears to have taken on a profile it clearly it did not have at the Employment Tribunal. Mr Crosfill who has appeared on behalf of the Claimant has submitted to us that the EAT ought to bear in mind the consequences of this decision to other child employees and hundreds of thousands of paper boys and girls in England and Wales. Not only does it affect children's rights to claim remedies for unfair and wrongful dismissal, it impacts upon wider issues on whether they are protected by Employers' compulsory liability insurance. Paper boys and girls are an essential part of many communities, providing a lifeline to the elderly in rural areas such as Sturry. According to a survey by Halifax bank in 2004 35 per cent of compulsory school age children had paper rounds, compared to just 19 per cent in 2007.

20. Footnotes of these paragraphs inform us that:

> **"It is estimated that between 1.1 and 1.7 million of the 11-15 school age population might be working at any given time."** Sandy Hobbs, Sandra Lindsay, Jim McKechnie, *The extent of child employment in Britain*, British Journal of Education and Work, vol 9 no. 1. 1996 pages 5-18.

21. A further footnote tells us that:

> **"In 2003, The National Federation of Retail Newsagents estimated the number of paper boys and girls at 192,000, 71% of whom were between the ages of 13 and 15."** Addison v Ashby [2003] IRLR 211, paragraph 9.

22. We feel bound to say we are not sure that this is really an appropriate test case because of the particular findings made by the Employment Tribunal. Any case involving the employment of children is likely to be fact sensitive.

23. Before we turn to consider the points raised on appeal we note the Claimant has not sought to put before us any of the evidence that was before the Employment Tribunal, whether by reference to the notes of the Employment Judge or otherwise. We have been shown the witness statements placed before the Employment Tribunal but it is impossible to know what

oral evidence was put before the Employment Tribunal save where it has been referred to by the Employment Tribunal. It has been submitted to us that there is a distinction to be drawn between primary and secondary facts or inferences from primary facts drawn by the Employment Tribunal. It was submitted to us that it was easier for the Employment Appeal Tribunal to interfere with such secondary findings or inferences, especially where there was no evidence to support them. The difficulty in this submission, of course, is that in the absence of knowing what the evidence was it is very difficult to say whether there was evidence to support the finding.

24. It is firstly said the Employment Tribunal was wrong to find that there had been no mutuality of obligation. The finding that the Respondent had no obligation to provide the Claimant with work was perverse because a temporary cessation of work would not provide a factual basis for concluding there was no obligation on the part of the Respondent to provide work. Finding that there was no obligation to provide work could only have come, it was submitted, from conduct or an inference because it was unlikely there should be any express agreement. The idea that the Claimant could attend at the Respondent's premises at 7.00am to be told there was no work or that he was not needed and accordingly would not be paid was inconsistent with the fact that he was paid a weekly wage. It was submitted to us, therefore, that we might in the circumstances see if there was evidence available to support the inference; if not those inferences would fall away. The Employment Tribunal, it was submitted should have asked whether the Claimant was obliged to do a minimum of work.

25. It was then submitted that the finding by the Employment Tribunal that there was no mutuality of obligation was perverse or wrong. Although Mr Crosfill conceded there was evidence on which the Employment Tribunal might find the Claimant was under no obligation to work that finding was "infected" by the mistaken finding as to the nature of the Claimant's

obligation. Once it was found that the Respondent was obliged to provide work that would make the Claimant's obligation wholly different to that it would be if the Respondent had no such obligation. The Employment Tribunal should have asked not whether the Claimant was bound to do work when offered but whether he was obliged to do any work.

26. It was submitted that the Claimant when he found someone to cover for him could only find another paper boy; again we note that we are unable to say this is the case as we do not know what the precise evidence was before the Employment Tribunal.

27. It was then submitted that at paragraph 12 of the Decision the Employment Tribunal should have asked whether the terms of the contract were inconsistent with employment rather than whether the terms were consistent with it and the Employment Tribunal was wrong to say that a contract of service required there to be set hours each week in return for a weekly wage. The fact that the Claimant was paid in cash and provided his own bicycle were neutral and did not negative there being a contract of employment or point to a contract for services. The Claimant would not have paid either tax or national insurance.

28. It was said that the Employment Tribunal ignored a number of relevant matters including (a) who owned the assets of the newsagents business and (b) the degree of control exercised over the Claimant.

29. Mr Crosfill addressed this on the peculiar position of child workers. He drew our attention to **Council Directive 94/33/EC** on **The Protection of Young People at Work,** which was expressed purely in terms of "employer" and "employee". He pointed to the limitation as to the work the children might do and that they might only do it under a stringent regime calculated to protect their health safety and education.

30. Our attention was also drawn to the **Children and Young Persons Act 1933** and in particular Section 18 (see paragraph 18 above).

31. It was submitted boldly to us that the effect of Section 18 of the 1933 Act was to provide that a child might not undertake work unless he became an employee. Only if the child became an employee could the necessary protections by way of risk assessment limit on hours, breaks and holidays and responsibility for health and safety be adequately achieved.

32. The final point of the ground of appeal relied upon was one which it was conceded was not put before the Employment Tribunal. It was submitted that the Employment Tribunal should have considered if there was no overarching agreement whether the Claimant might be regarded as eligible to claim unfair dismissal by reason of "joining up" his days of work under sections 210 and 212 of the **Employments Right Act** as for example in the case of **Prater v Cornwall County Council** [2006] ICR 731. It was submitted to us at the time the Claimant was actually carrying out his newspaper round there was sufficient control over him exercised by the Respondent for him to be regarded as an employee.

The Respondent's Submissions

33. The submissions on behalf of the Respondent were succinct. Mr Salter submitted the Employment Tribunal was correct in determining the Claimant was not an employee. It had asked itself the correct questions and directed itself properly as to the law. It was also clear that the Employment Tribunal found there was no overarching agreement for the Claimant to attend work.

34. In relation to submissions made by Mr Crosfill as to the effect of the **Children and Young Persons Act** Mr Salter submitted it was sufficient for a child to be classified as a "worker" and drew attention to the well known distinction between workers and employees, for example that to be found to be found in section 230 of the **Employments Right Act**.

35. The fact that a child was "in employment" does not mean that he is to be regarded as an employee. Mr Salter submitted that a Claimant had run together the concepts of employment and employee. A person can be "employed" either as an employee or as a worker.

36. The Employment Tribunal was clearly aware of the issue of personal service; it was not suggested the right of delegation in this case was a sham. There was no finding that the right of delegation had been fettered in any way. It was not limited to other paper boys. There was no challenge. Mr Salter pointed out the findings of paragraph 6:10 as to the Claimant's obligation to attend and his ability to send someone else to do his round.

37. The question of joining up separate contracts was not argued below and we should not allow it to be argued now. In any event on the finding of the Employment Tribunal there was no contract of employment so far as the Claimant was concerned when actually carrying out his paper round.

38. Regardless of the issues of mutuality and the obligation to provide work the Respondent had said that she regarded paper boys as casual workers that is not the findings of paragraphs 6:9 and 6:10 of the Employment Tribunal Judgment were based on the evidence before the Employment Tribunal.

Conclusions

39. As we have noted, although at a late stage in the hearing we were provided with witness statements from the Claimant and his parents, (the Respondent's witness statement was in the bundle) at no time had the Claimant sought to agree notes of the evidence before the Employment Tribunal or in default of agreement to seek the notes of the Employment Judge. Consequently, as we have already said we do not know precisely what evidence was before the Employment Tribunal and in particular what emerged in cross examination or questioning from the Employment Tribunal. It is wholly inappropriate for us to speculate or decide that the evidence did or did not differ from the witness statements.

40. On the question of whether it was perverse for the Employment Tribunal to conclude that the Respondent was under no obligation to provide work to the Claimant we recognise in a sense it would be surprising if a young man, paid on a weekly basis, was to turn up at 7.00 am to be told there was no work today for him and he would not be paid. That, however, of course would depend on the terms of his agreement. The Respondent in her witness statement said that she believed that the paper boys were "casual workers" and this, it was said, may have led the Employment Tribunal to say at paragraph 6:9 that:

"If for example newspapers were not delivered the Respondent would not be paid."

The use of the term "for example" suggested, it was said that was based on a misunderstanding of basic facts and was an inference or secondary finding based on a misunderstanding of the relationship. We note that in paragraph 11 the Employment Tribunal also found that if the Respondent did not need the Claimant to do a round she could tell him not to attend without obligation to pay him. While we have some reservations about the finding that the Respondent was not obliged to provide the Claimant with work, we recognise that we have not seen the relevant evidence. Further, even were the Employment Tribunal to be wrong as to the absence of the Respondent's obligation to provide work we do not decide the appeal on this basis. It is

clear that there was evidence available to support the other finding to which we next turn that the Claimant was under no obligation to do work if asked to do so.

41. In relation to this other side of the requirement for there being mutual obligations, the Employment Tribunal findings are clear and are based in evidence, as has been conceded. We are unable to accept the submission that this finding is somehow "infected" by the error of the Employment Tribunal (if that is what it was) in finding that the Respondent had no obligation to provide work to the Claimant. There was clear evidence that was accepted by the Employment Tribunal that the Claimant was not obliged to turn up for work and could arrange for someone else to attend and do his round; see the passages we have quoted from the decision of the Employment Tribunal at paragraphs 6:10 and 6:11. Even were the Respondent obliged to provide the Claimant with work, the Claimant on the findings of the Employment Tribunal was not obliged to accept that work whether all of that work or in part. Accordingly the Employment Tribunal decision on the lack of mutuality cannot be assailed it is firmly based on the evidence accepted by the Employment Tribunal.

42. We finally turn to consider the effect of Section 18 of the **Children and Young Persons Act 1933** which restricts and regulates the "employment" of children. We accept the Respondent's submission that this does not provide that children who work are necessarily employed under a contract of service.

43. We agree with the statement in Halsbury Laws of England (4th Edition 2008 reissue volume (5) paragraph 746) that a wide interpretation should be given to the term "employment" in Section 18 so that it encompasses children who are not employees in the strict sense of the word but are employed under contracts for services. This, of course, is the distinction drawn in Section 230(5) of the **Employments Right Act**. Such protections as are necessary can be

included in the terms of any permit as made clear by the broad powers given to Local Authorities under Section 18.

44. In relation to the submission that the Employment Tribunal should have considered the "joining up" of the occasions when the Claimant carried out his paper round was not argued below. For that reason alone it is inappropriate to deal with this appeal because all relevant facts have not been explored. In any event the Employment Tribunal's findings were not only that there was no overarching contract but by reason of the nature and circumstances of the case, the work undertaken by the Claimant on any given day was not work done under a contract of employment (see paragraph 12 in particular).

45. In the circumstances the appeal must be dismissed.