

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 4 April 2007

Before

THE HONOURABLE LADY SMITH

(SITTING ALONE)

1) MS K BALMAIN
2) MR W LIVERSIDGE
3) MRS P LIVERSIDGE

APPELLANT

ATLAS CLEANING LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

Mr Alan James Hutcheson
(Solicitor)
Messrs Hutcheson & Co Solicitors
17 Strathmore House
East Kilbride
G74 1LF

For the Respondent

Neither present nor represented

SUMMARY

Practice and Procedure – Case management

Employment Tribunal had refused to grant witness order on the application of Claimants in an unfair dismissal claim because (1) dismissal was admitted and so the onus was, they said, on the Respondents to show both the reason for the dismissal and that it was fair; and (2) the Claimants could ask for sight of the Respondents' witness list. The witness in question was the manager of a shop to which the Respondents had provided the Claimants as cleaners; the Respondents were asserting that they had had to dismiss the Claimants as the shop manager had required that they be removed from working at those premises. On appeal, the appeal was upheld and an order was substituted ordering that the witness attend the forthcoming hearing and give evidence if called on so to do. The Tribunal's refusal was perverse: the onus was not on the Respondents to show fairness, the Tribunal had, in any event, taken account of an irrelevant matter in considering onus, and the Tribunal had failed to take account of the fact that seeing the Respondents' witness list would not, of itself, secure the witness for the Claimants. The witness was plainly one who had potentially relevant evidence to give and the Claimants were entitled to seek to have her evidence available to them.

THE HONOURABLE LADY SMITH

1. This is the case of Ms K Balmain, Mr W Liversidge and Mrs P Liversidge against Atlas Cleaning Ltd. It comes before me this afternoon with representation for the Claimants, namely Mr Hutcheson, Solicitor. There is no appearance for the Respondents but they have written to this Tribunal by letter dated 23 March 2007 to advise that the matter of witness orders is, in their view, a matter for Tribunal and they do not feel that they can adequately comment within the appeal. They have confirmed that they did not intend to appear today. I proceed accordingly in their absence.

2. By way of very short introduction I can say that these Claimants claim that they were unfairly dismissed. Prior to their dismissals they worked as cleaners in the employment of the Respondents. They carried out their work at the Zara store in East Kilbride. The Respondents say that their dismissals arose because of an instruction from Zara UK Ltd that they be removed from the store on account of stock losses which they attributed to the Claimants. I note that a full hearing in this case is due to take place before the Employment Tribunal sitting at Glasgow on 16, 17 and 18 April.

3. I have been advised by Mr Hutcheson today that his firm wrote to the manager of the Zara store, Nicola Stripinoffski, on 6 February 2007 asking her if they could obtain a statement from her and that he be provided with a copy of that letter. She has however refused to comply with that request. A witness order has been sought from the Employment Tribunal but the Claimant's application for that order has been refused. In a letter dated 20 February 2007 D Donnelly on behalf of the Secretary of Tribunals advised:-

“The Chairman of the Tribunals Mr N Hosie has instructed me to advise you that your request for a witness order has been refused. As the dismissal is admitted it is for the

Respondent to examine the reason and show that they acted reasonably. You may wish to request from the Respondent's representative a list of their witness."

The Appeal

4. The Claimants appeal against the refusal of the witness order. It is submitted on their behalf that the Tribunal erred in respect that in refusing to grant the order it took into account an irrelevant matter, namely the nature of the onus of proof. In respect that the onus may rest initially on the Respondents that should not, it was submitted, preclude the Claimants from leading their own substantive evidence.

5. Separately, it was submitted that the Tribunal took into account an irrelevant factor, namely the ability of the Claimants to make enquiries about the Respondent's witness list. That would take them no further forwards since the Respondents would not be under any obligation to call any witness on their list to give evidence at the hearing. In these circumstances I was invited to uphold the appeal and to grant the witness order sought.

6. So far as disposal is concerned, I am readily persuaded by the Claimants' submissions that the Tribunal erred in law in refusing to grant the order sought. It was quite wrong to suggest that the Respondents would, in addition to bearing the burden of showing the dismissal was for a relevant reason, also bear the burden of showing that they acted reasonably. That is not the import of section 98(4) of the **Employment Rights Act 1996**. However, more significantly the witness in question seems plainly to have relevant evidence to give, whether as regards to the true reason for the dismissal or the reasonableness of it. The fact that the onus is on the Respondents to establish the reason for the dismissal does not disentitle the Claimants from seeking to see to it that they have her evidence available if they consider it could assist them in countering the Respondent's case on reason or on fairness. I agree that the Tribunal took account of an irrelevant matter, namely that of onus, and that they failed to take account of

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the fact that merely getting sight of the Respondent's witness list would not assist them in securing the witness's actual attendance at the hearing to give evidence.

7. In these circumstances I am satisfied that the refusal to grant the witness order sought was perverse. I will accordingly uphold the appeal and substitute for the Employment Tribunal's order, an order requiring the witness, Nicola Stripinoffski, the manager of Zara UK Ltd, 17 Centre West, East Kilbride, G74 1LL to attend at the Employment Tribunal offices in Glasgow on 17 and 18 April and give evidence if called on so to do in connection with this case.