Appeal No. UKEAT/0182/19/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2019

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

DIGITAL COMMUNICATION SYSTEMS LIMITED APPELLANT

MR C SCULLY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LESLIE MILLIN (of Counsel) Instructed by: DAS Law North Quay Temple Back Bristol BS1 6FL
For the Respondent	MR PHILIP SAYERS (of Counsel) Instructed by: Coodes Solicitors Elizabeth House Castle Street Truro Cornwall TR1 3AP

SUMMARY

JURISDICTIONAL POINTS – Worker, employee or neither

The issue before the Employment Judge ("EJ") was whether the Claimant was an employee, a "limb (b)" worker or neither. He rejected the claim that the Claimant was an employee inter alia on the basis that there was no obligation to provide personal service because there was a right of substitution and then went on to decide that he was a "limb (b)" worker. Those two propositions could not stand together and the appeal against the finding that he was a "limb (b)" worker had to be allowed. The matter was remitted to a new EJ to decide the "limb (b)" worker issue afresh in the light of the original findings of primary fact.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Respondent below, Digital Communication Systems Limited, against a decision of Employment Judge Roper in Plymouth to the effect that the Claimant was a "limb (b)" worker for the purposes of employment legislation, and, therefore, able to claim for unpaid accrued holiday pay and unlawful deduction of wages. The Employment Judge also found that he was not an employee and so could not bring claims for unfair dismissal or wrongful dismissal. There is no cross-appeal in relation to that decision and I note that the judge gave a number of reasons for concluding that the Claimant was not an employee at paragraph 26, some of which have not been discussed at all in this hearing.

2. Unfortunately, it is acknowledged and accepted that the Judgment contains within it a fundamental contradiction. In paragraph 26 in the course of dealing with whether the Claimant was an employee the judge says, among other things:

> **"26. ….. There was an unqualified right to appoint a deputy at his own expense, even though in reality the need to do so had never arisen … there was no…. requirement for personal service…."**

Then at paragraph 28, when the judge is dealing with the question of whether he was a "limb (b)" worker (which requires an obligation to provide services personally), the judge says this:

> **"28. Turning to the "limb (b) worker" definition I have considered carefully whether under section 230(3)(b) the claimant meets the wider definition of "worker". I find that that definition is met because the claimant worked under an express contract with the respondent and agreed to perform work and or services personally for the respondent when realistically the respondent was not a client or customer of a professional business undertaking which was carried out by the claimant."**

Those statements are contradictory and simply cannot stand together. On that basis the decision is in my judgment flawed on its face, and the appeal must be allowed.

3. There has been a suggestion from the Respondent to the appeal, the Claimant below, that I might decide the "limb (b)" worker issue myself. It does not seem to me appropriate for the Employment Appeal Tribunal to decide the issue, and I am clear that it should be remitted to a different judge sitting in Plymouth. The parties accept, and it will be much more convenient than having a hearing *de novo*, that they should proceed on the basis of the primary facts found by Judge Roper, which are set out at paragraphs 4 to 14 of his Judgment. The appropriate inferences to be drawn from those facts, appropriate findings about the contractual relationship between the parties and the final issue as to whether the Claimant was or was not a "limb (b)" worker are matters on which the parties can make submissions at a further hearing before a new employment judge.