

I.C.R.

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[EMPLOYMENT APPEAL TRIBUNAL]

POST OFFICE v. HOWELL

1999 July 22;
Nov. 1

Charles J., Mr. J. R. Crosby and Mr. D. J. Jenkins

- B *Industrial Relations—Employment tribunals—Constitution of tribunal—Chairman sitting alone to hear deduction from wages claim involving collective agreement—No exercise of discretion whether to remit to full tribunal—Effect of failure to exercise discretion—Whether appropriate case for chairman alone—Employment Tribunals Act 1996 (c. 17), s. 4(5)¹*

- C On a complaint by the applicant employee of unlawful deduction from his wages, in relation to his entitlement to overtime for work on a bank holiday under a collective agreement, the parties attended the hearing, with witnesses who were senior employees of the employer and officials of the union who had negotiated the agreement, expecting the matter to be heard by a full tribunal. A chairman sitting alone had been allocated to hear the case, and, though no reasons were given for that allocation, no objection was raised to the case being heard by a chairman alone. The tribunal upheld the employee's complaint.

- D On appeal by the employer:—
Held, allowing the appeal, that, although a chairman of an employment tribunal was under a mandatory obligation to exercise the discretion under section 4(5) of the Employment Tribunals Act 1996 whether to refer a matter to be heard by a full tribunal or to sit alone, failure to do so did not result in a lack of jurisdiction, or decisions made thereafter, sitting alone, being nullities, but constituted an irregularity; that, accordingly, the failure of the chairman to consider his power under section 4(5) did not render the decision a nullity; but that, as the issue was the construction, and effect on individual contracts of employment, of the collective agreement, the contribution of the members of the employment tribunal would be likely to be of real assistance in the decision-making process both as to the resolution of the factual disputes and the construction of the collective agreement and its effect on individual contracts; and that, in those circumstances, the right course was to remit the case for a rehearing before a full tribunal (post, pp. 917B-C, 918C, E-F, 919A-C).

- F *Sogbetun v. Hackney London Borough Council* [1998] I.C.R. 1264, E.A.T. considered.

- G The following cases are referred to in the judgment:
Secretary of State for Trade and Industry v. Langridge [1991] Ch. 402; [1991] 2 W.L.R. 1343; [1991] 3 All E.R. 591, C.A.
Sogbetun v. Hackney London Borough Council [1998] I.C.R. 1264, E.A.T.

- H ¹ Employment Tribunals Act 1996, s. 4: "(1) . . . proceedings before an employment tribunal shall be heard by—(a) . . . the chairman, and (b) two other members . . . (2) Subject to subsection (5), the proceedings specified in subsection (3) shall be heard by [the chairman] alone. (3) The proceedings referred to in subsection (2) are—. . . (c) proceedings on a complaint under section 23 . . . of the Employment Rights Act 1996 . . . (5) Proceedings specified in subsection (3) shall be heard in accordance with subsection (1) if . . . the chairman of an employment tribunal . . . decides . . . that the proceedings are to be heard in accordance with subsection (1)."

Sutcliffe v. Big C's Marine Ltd. [1998] I.C.R. 913, E.A.T.

Tsangacos v. Amalgamated Chemicals Ltd. [1997] I.C.R. 154, E.A.T.

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No additional cases were cited in argument.

APPEAL from an industrial tribunal sitting at London (South).

By an originating application dated 28 November 1997 the applicant, Gerald Howell, complained of an unlawful deduction from his wages by the respondent, the Post Office, and sought written particulars of his contract of employment. By a decision sent to the parties on 30 July 1998 the tribunal (chairman sitting alone) upheld the complaint.

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By notice of appeal dated 1 September 1998 the respondent employer appealed on the grounds, inter alia, that the industrial tribunal erred in law (1) in finding that the collective agreement between the employer and the Communication Workers Union dated 18 August 1995 had the effect of varying the applicant's contract of employment; (2) in finding that there might be instances where the employer was entitled according to the applicant's contract to vary its terms following discussion or negotiation with the union irrespective of agreement by posting a notice in the Post Office Gazette but that in the circumstances of the present case the employer was not so entitled; (3) in finding that variations to the applicant's contract of employment in February 1996 and February 1997 were of no effect; and (4) in failing to address the submission that the applicant had waived any right to challenge any unilateral variation by working and being paid without complaint and thereby affirming the new terms.

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The facts are stated in the judgment.

Andrew Burns for the employer.

Ian R. Scott for the applicant.

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Cur. adv. vult.

1 November. The following judgment of the appeal tribunal was handed down.

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CHARLES J. This is an appeal from a decision of a chairman of an employment tribunal at London (South) who sat alone on 11 March 1998.

1. The claim was made under section 13 of the Employment Rights Act 1996 and the applicant before the employment tribunal, Mr. Howell, maintained that the respondent before the employment tribunal and the appellant before us, the Post Office, had made an unlawful deduction from his wages. The applicant also sought, pursuant to section 11 of the Act of 1996, a declaration as to his terms and conditions of employment. The issues related to his entitlement to overtime for work on a bank holiday.

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2. Shortly prior to the hearing we contacted counsel for the parties and invited them to make submissions as to the effect of the recent decision of the appeal tribunal chaired by the President, Morison J., in *Sogbetun v. Hackney London Borough Council* [1998] I.C.R. 1264.

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3. The *Sogbetun* decision was made after the employment tribunal dealt with this case. It concerns hearings by chairmen sitting alone and, as counsel submitted to us, potentially has far reaching consequences. We

A asked for submissions on the *Sogbetun* case because it seemed to us that it supported the conclusion that this appeal should be allowed on the basis that the chairman sat alone and gave no reasons for doing so.

B 4. We heard helpful submissions and in addition to the *Sogbetun* case we were referred to two other decisions of this tribunal chaired by the President, namely, *Tsangacos v. Amalgamated Chemicals Ltd.* [1997] I.C.R. 154 and *Sutcliffe v. Big C's Marine Ltd.* [1998] I.C.R. 913, which relate to a chairman sitting alone pursuant to rule 6 in Schedule 1 to the Employment Tribunals (Constitution and Procedure) Regulations 1993 (S.I. 1993 No. 2687).

C 5. The counsel who appeared before us were the counsel who had appeared below. They explained that they had attended for the hearing expecting that the case would be heard by a full employment tribunal but had found that a chairman sitting alone had been allocated to hear the case. They did not know, and we do not know, who made that allocation decision or the reasons for it.

D 6. As paragraph 3 of the extended reasons demonstrates, both sides attended with two witnesses who gave evidence. We were informed by counsel for the Post Office that the witnesses he proposed calling (and did call) were senior employees of the Post Office whom it would have been difficult and expensive to get for another hearing and that that was a factor in the Post Office's decision to go ahead before a chairman sitting alone.

E 7. At the time of the hearing, and in their written submissions that followed it, neither side raised with the other, or made any objection to, the case being heard by a chairman sitting alone. As we understand it both sides simply accepted the allocation that had been made. We can understand why they did so.

8. As we understand, it there was no overt consideration by the chairman as to whether he should sit alone.

F 9. It is right to record that through its counsel the Post Office asserted to us that it had not expected that there would be any real dispute as to the facts, and had not anticipated that the union officials would deny in their evidence that the bank holiday overtime issue had simply been overlooked, or that the intention in 1995 was to rationalise overtime rates and cut supplements across the board.

10. The main contention of the Post Office before the employment tribunal, and on the appeal, was that the principal issues upon which this case should be decided arose out of the construction of the documents.

G 11. However, both sides attended for the hearing before the employment tribunal with witnesses who were senior employees or officials who, as we understand it, had been involved in the negotiations and discussions that took place before, and after, the collective agreement reached in 1995, and in making that agreement, and it was envisaged that they would give evidence about such matters. It seems that before the hearing no attempt was made to agree the relevant facts, or any of them.

H 12. Additionally, and understandably whatever his understanding as to the extent of relevant factual disputes before the hearing before the chairman alone began, the applicant through his counsel in his skeleton argument for this appeal relied on findings of fact made by the chairman (having heard the four witnesses). For example, he relied on the findings in

paragraphs 12 and 13 of the extended reasons which relate to the negotiations and the understanding in 1995 of the Post Office on the one side and the union on the other.

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13. Further, and in any event, it was always the case that an issue in the case was going to be the construction, and the effect (or potential effect) on individual contracts, of the 1995 collective agreement and in our judgment this is something upon which a chairman would be likely to receive assistance from tribunal members.

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The stance of the parties

14. The Post Office did not argue that this appeal should be allowed on the basis that the chairman heard the case sitting alone. However it acknowledged that we should consider a jurisdictional point and that the chairman may have been assisted by the views of tribunal members in considering the construction of the collective agreement and its effect on individual contracts.

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15. The main argument that we should proceed to hear the appeal was advanced on paper, and orally, by counsel for the applicant. We are grateful to him for his argument.

Sogbetun v. Hackney London Borough Council [1998] I.C.R. 1264

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16. In our judgment, notwithstanding that (i) there are indications in the *Tsangacos* [1997] I.C.R. 154 and *Sutcliffe* [1998] I.C.R. 913 cases that this tribunal might have taken a different view, and (ii) in the *Sogbetun* case this tribunal considered the merits of the appeal, the judgment in the *Sogbetun* case, at pp. 1268B-D, 1269F-H, are to the effect that: (a) before he sits alone in the qualifying proceedings identified by section 4(3) of the Employment Tribunals Act 1996 a chairman *must* have exercised his discretion conferred by section 4(5) negatively (our emphasis), (b) a case cannot be heard by a chairman sitting alone without the matters referred to in section 4(5) having been evaluated by a chairman, (c) the consent of the parties is not determinative as to how the discretion of the chairman concerning whether or not he, or she, should sit alone should be exercised, (d) unless the chairman exercises his, or her, discretion under section 4(5) an employment tribunal comprising a chairman sitting alone that adjudicates on a qualifying case is not properly constituted in accordance with the statute, (e) if the employment tribunal is not for that reason properly constituted its decision is a nullity, and (f) the points as to the proper constitution of the employment tribunal, and its effect, are ones of jurisdiction and the parties cannot confer jurisdiction by consent, waiver, acquiescence or estoppel.

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17. Stopping there, as appears above, so far as we are aware this is a case in which the chairman did not exercise his discretion. In this context we repeat that he was dealing with the case before the *Sogbetun* case had been decided and therefore he cannot be criticised for not taking it into account. But an application of the points referred to above in the judgment in the *Sogbetun* decision leads to the conclusion that his decision is a nullity and we should on that basis remit the case to the employment tribunal.

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18. It may be that in stating that (i) the point at issue went to "jurisdiction," and (ii) the decision of the chairman sitting alone in the *Sogbetun* case was a "nullity," the appeal tribunal was not intending to use

A those expressions in their technical sense. This view is supported by the fact that the appeal tribunal in the *Sogbetun* case went on to consider the merits of the case and whether it was just that the case had been heard by a chairman sitting alone.

B 19. Points as to an issue going to “jurisdiction” with the consequence that a decision is a “nullity” are different to, and distinct from, the question whether a chairman has a duty (and thus a mandatory obligation) to consider the exercise of his, or her, power (and thus to exercise his, or her, discretion) under section 4(5) of the Employment Tribunals Act 1996. As to that it seems to us that the *Sogbetun* case clearly decides, and proceeds on the basis, that a chairman has a duty (and thus a mandatory obligation) to exercise his, or her, discretion under section 4(5).

C 20. However failure to comply with a mandatory obligation imposed by statute in respect of proceedings does not necessarily result in a lack, or loss, of jurisdiction and the decisions made thereafter being nullities. Such a failure can be treated as an irregularity (see, for example, *Secretary of State for Trade and Industry v. Langridge* [1991] Ch. 402, in particular at pp. 410F-411G).

D 21. If one assumes that, taken as a whole, the *Sogbetun* case [1998] I.C.R. 1264: (a) is not authority for the proposition that a failure by a chairman to consider whether or not he, or she, should sit alone goes to jurisdiction and renders his, or her, decision a nullity, but (b) is authority for the proposition that a chairman has a mandatory duty to consider whether or not to hear qualifying proceedings sitting alone and a failure to do so is an irregularity questions then arise as to what the effect of the failure is in a given case.

E 22. The judgment in the *Sogbetun* case, at p. 1270C-D, refers to a defective exercise of discretion, and a failure to give reasons for a decision in exercise of the discretion, but does not deal with the question whether in those circumstances, which depend on there having been an exercise of the discretion, the appeal tribunal were of the view in the *Sogbetun* case that a defective exercise of discretion, or the omission to give reasons, also went to jurisdiction and rendered the decision a nullity. In our judgment it would be surprising if they had been of that view. It seems to us that in such a situation the appeal tribunal in *Sogbetun* would have taken an approach similar to that taken when there has been an irregularity and would have asked themselves whether there was an error of law which should lead to the case being remitted.

G 23. In our judgment, if the appeal tribunal (chaired by the President) in the *Sogbetun* case had treated a failure of a chairman to exercise his, or her, discretion under section 4(5) of the Employment Tribunals Act 1996 as an irregularity that did not go to jurisdiction and render his subsequent decision a nullity, it is clear from their judgment, taken as a whole, that they would have been strongly of the view that, in a case where the views and experience of the tribunal members were likely to be of assistance to the decision-making process: (i) a chairman should generally decide pursuant to section 4(5) that the case be heard by a full tribunal, and H (ii) the effect of the irregularity of not exercising his, or her, discretion under section 4(5) should generally be a remission of the case by this tribunal for hearing by a full employment tribunal.

24. The effect of treating a failure by a chairman to exercise his, or her, discretion under section 4(5) as something that is an irregularity which does not go to jurisdiction does not mean that the chairman can abdicate his, or her, duty or surrender it to the parties. It would however mean that the rigidity of the approach in *Sogbetun v. Hackney London Borough Council* [1998] I.C.R. 1264 to consent being given by the parties to the chairman sitting alone would not apply. Greater flexibility as to the consequences of the stance of the parties would be introduced. For example, if they formally agreed and consented to the chairman sitting alone, that might be treated as an exercise of the discretion by an overt, or tacit, acceptance of the agreement, or, in some circumstances, the irregularity might be held to have been waived.

Our decision and approach

25. With respect to the members of this tribunal who decided the *Sogbetun* case, we do not accept or agree that a failure by a chairman to exercise his, or her, discretion under section 4(5) of the Employment Tribunals Act 1996: (i) goes to his, or her, jurisdiction, and (ii) has the result that the decision he, or she, reaches in the case when sitting alone is a nullity.

In our judgment that conclusion does not accord with: (a) the structure of section 4 of the Act of 1996 and, in particular, with the mandatory terms of the last part section 4(2), namely, that “the proceedings specified in subsection (3) *shall* be heard by the person mentioned in subsection (1)(a) alone” (our emphasis); and (b) the authorities referred to and applied in *Secretary of State for Trade and Industry v. Langridge* [1991] Ch. 402 (we note and take comfort from the fact that the case and the authorities referred to are not mentioned in the *Sogbetun* case and do not seem to have been taken into account by this tribunal when deciding it).

26. In our judgment, if a chairman has a mandatory obligation to consider the exercise of the power conferred by section 4(5) of the Employment Tribunals Act 1996, and thus to exercise his, or her, discretion thereunder, a failure to do so is an irregularity.

27. Albeit that we accept that there is force in the argument that a chairman does not have a duty (and thus a mandatory obligation) to consider the exercise of the power, and thus to exercise the discretion, conferred by section 4(5), we have concluded that as a matter of comity we should follow the *Sogbetun* decision in this respect. We therefore proceed on the basis that the chairman in this case had a duty (and thus a mandatory obligation) to exercise his discretion under section 4(5).

28. We comment that, if there is not such a mandatory obligation, questions arise as to whether in a given case a chairman should have considered the point whether he, or she, should sit alone and if he, or she, should have considered what the consequences of a failure to do so would be. In our view these are not easy questions. If we did not follow the part of the *Sogbetun* decision that a chairman has a mandatory obligation to consider the exercise of the power contained in section 4(5) of the Act of 1996 (and thus to exercise the discretion it confers) we would have to deal with these questions and would thereby reach a decision that adopts a different approach to the *Sogbetun* case.

A 29. It seems to us that conflicting decisions, or approaches, of this appeal tribunal on the nature of the task of a chairman concerning the exercise of his, or her, discretion under section 4(5) would be likely to cause damaging confusion.

B 30. We therefore proceed on the basis: (i) that the decision of the chairman in this case was not made without jurisdiction and was therefore not a nullity, but (ii) the failure of the chairman to overtly consider the exercise of his power under section 4(5) and thus to exercise his discretion thereunder was a failure to perform a mandatory obligation which, although it does not go to jurisdiction, does constitute an irregularity.

C 31. In our judgment, without the benefit of hindsight, this is a case in which the contribution of the members of the employment tribunal would be, or would be likely to be, of real assistance in the decision-making process both as to: (a) the resolution of the factual disputes, and (b) the construction of the collective agreement and its effect on individual contracts.

D 32. These views are confirmed by hindsight, which demonstrates that there were factual disputes. These disputes may have been greater than expected but in our judgment the very fact that both sides attended with two witnesses shows that there was always a real potential that factual disputes would arise as to which the contribution of the members of the tribunal would be helpful.

E 33. In this case there was, as we understand it, no discussion or agreement during, or before, the hearing by the chairman of the employment tribunal on the issue whether he should sit alone. In those circumstances, having regard to: (a) our views expressed in paragraphs 31 and 32 as to the likely contribution of members of the tribunal in the determination of this case, and (b) our view that the members of this tribunal who decided *Sogbetun v. Hackney London Borough Council* [1998] I.C.R. 1264 were strongly of the opinion that in such circumstances a case in which a chairman had not exercised his, or her, discretion under section 4(5) of the Act of 1996 should be remitted to a full tribunal, we have concluded that in comity with the decision and approach in the *Sogbetun* case we should remit this case for hearing by a full tribunal.

F 34. In view of the arguments relating to, and the potentially far reaching effect of the *Sogbetun* decision, we give leave to appeal and express the hope that, if there is an appeal, the issues as to the constitution of an employment tribunal, jurisdiction and generally the approach that should be taken in respect of the qualifying proceedings defined in section 4(3) of the Employment Tribunals Act 1996 should be heard and determined by the Court of Appeal as soon as possible.

Appeal allowed.

Case remitted.

Leave to appeal.

H *Solicitors: Solicitor, Post Office Legal Services, Croydon; Pattinson & Brewer.*

C. N.