Torith v Stewart Duncan Robertson [1999] ADR.L.R. 11/02

The EAT before The Honourable Lord Johnston, Mr GR Carter, Mr WM Speirs. 2nd November 1999.

J U D G M E N T : LORD JOHNSTON:

1. This is an appeal at the instance of the employers against a decision of the Employment Tribunal in respect of 13 applications by employees claiming unlawful deduction from their wages, which arises out of the construction of part of the Working Rule Agreement, with Scottish Variations, for the Construction Industry ("the Agreement"), entered into *"Motor Vehicles (Road Licensed Vehicles within the Construction and Use Regulations) Vehicle up to and including 10 tons (or metric tonnes) Gross Vehicle Weight: driver of..... .... 4.Vehicle over 10 tons (or metric tonnes); driver of.. .... 3.Operations requiring a LGVLicence of either or both Classes C & E 1.Lorry drivers employed whole time as such required to holdClass C & E licence..... 1."*

2. The same agreement also contains comprehensive conciliation and dispute resolution procedures to be found in Rule 7, which essentially require any differences or disputes arising under the agreement to be referred to the Construction Industry Joint Council (C.I.J.C.).

3. The dispute in this case relates to how the provision which we have quoted in relation to skill rates should be interpreted with regard to the holders of LGV C licences as between skill rate 1 and skill rate 3.

4. Within the productions before us and before the Tribunal, were minutes of a meeting of the Dundee and Angus Local Joint Committee in respect of the Construction Industry held on 17 November 1998, which reveals on the second page that apart from the lodging of complaints with the Employment Tribunal, namely these present applications, there has been commenced by the Trade Union the conciliation procedures under Rule 7, to which we have referred.

5. As the Tribunal narrate, however, that process has become stalled by reason of a failure on the part of the trade unions to agree on their respective representation on the relevant Council. As such, therefore, there has been no official or authoritative ruling on the question that was presented to the Tribunal.

6. Against that background, the Tribunal Chairman states:- *"Whether the Working Rules Agreement for 1998/99 has an error in it or whether there is an ambiguity is something which needs to be resolved by agreement between the parties to that particular Agreement. I am asked for a decision and I must apply what that Agreement states categorically as quoted earlier in this decision, and, therefore, I find that skill rate 1 applies to the applicants and should be applied on 29 June 1998--that is 5.35 per hour."*

7. Both parties appear before us on amended grounds of appeal.

8. For the appellants, Mr Strain argued that the right of these applicants to go to the Employment Tribunal had been waived by them by reason of the fact that the matter had been referred under Rule 7 to the CIJC. The relevant provision was obviously ambiguous, he submitted, and the Tribunal should not have addressed itself to the matter until that ambiguity had been resolved by the reference to the CIJC. If, contrary to that position it was appropriate for the Tribunal to have considered it at all, he submitted, it was obvious from surrounding correspondence and circumstances that it was the lower rate that should apply. Thus the Tribunal had also erred in fixing the higher rate

9. Mr Steen, appearing for the respondents, simply submitted that the jurisdiction of the Tribunal was always open and given the ambiguity, the Tribunal was entitled to reach a decision which could only be shown to be wrong at this stage of the process if it was perverse. He submitted that upon the wording of the relevant passage in the Agreement, the decision of the Tribunal was understandable and therefore sustainable.

10. This dispute is simple to state but less easy to resolve. Plainly, the relevant terms of the Agreement are far from satisfactory if not ambiguous, which creates the basis for a dispute. However, it is important to look at that dispute in its context and not least in the context that arises out of the collective agreement which itself contains detailed disputes resolution procedures. It is appropriate, in our opinion, to compare that to an arbitration clause in a contract where it is settled law that the jurisdiction of the general courts can be excluded by such an agreement, at least to the extent of the

merits of the dispute until such time as it is resolved. The matter is thus regulated by contract i.e. the Agreement, to which both parties can if required be compelled to adhere.

11. In the present case, we consider the matter should be looked properly as one of jurisdiction rather than waiver. By embarking upon a reference to the Rule 7 Grievance and Disputes Resolution Procedure, we consider that the applicants have proceeded down a contractual path agreed by them in advance by entering into the Agreement, which contractual path the employers are, in our opinion, entitled to hold them to for the time being until such time as the route is exhausted, thus excluding the jurisdiction of the Tribunal to that extent. We therefore consider that the Chairman should not have embarked upon the task of settling the matter against the background of the Rule 7 procedure already being in force. It was premature for him so to do. Furthermore by so doing in advance of any decision taken under the Rule 7 procedure by the CIJC, anomalies could well arise as between his decision and any decision subsequently taken by that body.

12. In these circumstances we consider that the appropriate course is that the applications should be sisted, until the Rule 7 procedures are exhausted. We put it that way, because, if the trade unions continue to in effect block consideration of the matter by reason of their being unable to agree as to composition of the Council, very shortly a position could be reached where the applicants could return to the Tribunal to point out that the Rule 7 process has been frustrated and that accordingly the only remedy they have left is to bring the matter to the Tribunal. It is for that reason that we consider these applications to be sisted rather than dismissed.

13. In these circumstances this appeal is allowed, the decision will be quashed without any view being expressed as to its soundness as a matter of construction, and the matter remitted back to the Employment Tribunal with a direction that all 13 applications be sisted, without prejudice to either party to move for a recall of that sist, if there is a material change of circumstances and not least if the CIJC process becomes frustrated.

Mr A Strain, Solicitor Of- Messrs Biggart Baillie Solicitors 7 Castle Street EDINBURGH EH2 3AP appeared for the appellant
Mr K Steen, Solicitor Of--Messrs Dallas McMillan Solicitors Shaftsbury House 5 Waterloo Street GLASGOW G2 6AY appeared for the respondent