JUDICIARY OF
ENGLAND AND WALES

Stringfellows Restaurants Ltd
- and -
Nadine Quashie

Court of Appeal (Civil Division)

21 December 2012

SUMMARY TO ASSIST THE MEDIA

The Court of Appeal Civil Division (Lord Justice Elias) has today handed down a judgment upholding an earlier decision by the Employment Tribunal that Nadine Quashie was not an employee of Stringfellows.

Introduction

The background to the appeal is set out in paragraphs 1-3.

"Nadine Quashie ("the claimant") worked intermittently for a period of some 18 months as a lap dancer at the appellant's two clubs in London. One was Stringfellows and the other was Angels. On 9 December 2008 she was told that she would no longer be permitted to work for the company as she was believed to have become involved with drugs on the premises." (para 1)

"She brought an unfair dismissal claim." (para 2)

"The Employment Tribunal concluded that she was not an employee and in any event did not have the requisite period of continuous employment. The Employment Appeal Tribunal upheld the claimant's appeal.….The employer now appeals against each of those findings and seeks to restore the decision of the employment tribunal." (para 3)

The Law

The relevant law is set out in paras 4-8
"…some rights, including the right to claim unfair dismissal, are conferred on employees whereas others are conferred upon workers, a more widely defined category. All employees are workers but not all workers are employees." (para 5)

The role of an appellant court

This is considered in para 9

Mutuality of obligation

This is considered in paras 10 -14

"Even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place even during an individual engagement." (para 14)

The facts

The facts are set out in paras 15-26

"The Tribunal recounted in some detail how the dancers are remunerated and the nature of their expenses and other outgoings, which include certain fixed payments, commission, and fines. Tribunal's findings in this respect are of particular importance in this appeal and I set them out in full." (para 19)

"The Tribunal observed that the claimant would frequently be out of pocket after a night's work". (para 20)

The Documents

These are considered in paras 22 -26

"The club agreement provides at point 8 of the principal terms that the dancer will be an independent contractor paid by the clients." (para 23)

"The agreement emphasises that the company will be entitled to determine which other dancers may perform and it confirms that it guarantees no particular level of remuneration." (para 25)

The decision of the Employment Tribunal

This is discussed in paras 27 -28

"The Tribunal extracted, presumably from the *Ready Mixed* case, three elements which it held must be present if the relationship is to constitute a contract of employment:

> "1. The contract must impose an obligation on a person to provide work personally.

2. There must be mutuality of obligation between the employer and the employee; some legal obligation towards each other which is a continuing overriding arrangement.

3. There must be some form of control over the employee by the employer."

(para 27)

"The Tribunal concluded that the first and third of these were present and that is not challenged. However, they found that there was no relevant mutuality of obligation, although quite what they meant by that is a matter of dispute." (para 28)

The decision of the Employment Appeal Tribunal

This is discussed in paras 29-37

"HH Judge McMullen QC …. found that the Tribunal had held that there was no contract. This was a plain error, entirely at odds with the evidence, and it justified the EAT analysing the matter afresh. Moreover, the Tribunal had erred in concluding that there was no "wage-work bargain" on the facts of this case. Judge McMullen QC observed that the wage work bargain was not the only form which mutual obligations could take within the employment relationship. (para 33)

"The EAT also held, in a finding critical to its conclusion, that contrary to the view of the Employment Tribunal, the employer was under an obligation to pay the claimant. The fact that the clients provided the source of the pay was irrelevant." (para 34)

The grounds of appeal

These are set out in paras 38 -41

"….that the EAT was wrong to conclude that the Employment Tribunal had found that there was no contract. That was a misreading of their decision. The Tribunal was in fact using the concept of "mutuality of obligation" in two distinct ways." (para 39)

Discussion

The Court sets out its conclusions in paragraphs 42- 58

Lord Justice Elias said;

"I accept that the decision of the Employment Tribunal does somewhat confusingly use the concept of mutual obligations in two rather distinct senses…. However, I am satisfied that on

a fair reading of its decision as a whole, it was not saying that there was never any contract in place at all. (para 42)

"The critical question was whether the nature of those contractual obligations. Were they such as to render it a contract of employment….. In my view, the most important finding in that regard was the Tribunal's inference from the evidence that the employer was under no obligation to pay the dancer anything at all." (para 45)

In so far as the EAT was concluding that the only proper inference from the evidence was that the employer was contractually bound to pay wages, I strongly disagree. (Para 47)

"There is nothing inherently implausible in the finding of the Tribunal that the club was obliged to pay nothing. Indeed, the dancer herself understood the arrangement in that way at least when first employed, and it is what the terms of the agreement say, and the judge found that it was her understanding." (para 48)

"The fact that the dancer took the economic risk is also a very powerful pointer against the contract being a contract of employment." (para 51)

It follows that, in my judgment, the Employment Tribunal was fully entitled to conclude that there was no relationship of employer and employee constituted by this arrangement. (para 55).

Lord Justice Elias concluded by saying

"I would uphold the appeal and restore the finding of the Tribunal that the claimant was not employed under a contract of employment. It follows that the Tribunal has no jurisdiction to hear her claim of unfair dismissal." (para 59)

-ends-

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.