

Appeal No. UKEAT/0486/07/JOJ

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 29 October 2007

Before

HIS HONOUR JUDGE McMULLEN QC

MR R LYONS

MR M WORTHINGTON

MR D MILLER

APPELLANT

COMMUNITY LINKS TRUST LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant

MR D IBEKWE
(Friend)

For the Respondent

MR A BLAKE
(of Counsel)
Instructed by:
Messrs Link Trust Ltd Legal Services
105 Barking Road
London
E16 4HQ

SUMMARY

Practice and Procedure – Appellate jurisdiction/Reasons/Burns-Barke

Time Limits – Reasonable practicability

The EAT refused to allow an application served today to amend the Notice of Appeal.

Khuddados applied.

The Employment Tribunal did not err when it rejected the Claimant’s representative’s 4 excuses for not presenting the claim in time, holding it reasonably practicable for him to do so. He pressed the “submit” button on the Employment Tribunal website at 23.59.59 on the last day. It was received at 00.00.08 so it was presented 9 seconds out of time. **Beasley** applied.

Upon the resumption by the Employment Tribunal of management of this case and its hearing on 31 October 2007, the attention of all parties and their representatives and the Employment Tribunal is drawn to the **Compensation Act 2006** s4(1) and to regulations thereunder affecting the provision of Regulated Claims Management Services of which this claim is one. The papers are referred to the Regulator, Rt Hon Jack Straw MP, Secretary of State for Justice.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the time limit for presenting a claim of unfair dismissal which is 3 months less a day from the date of dismissal and was missed by 9 seconds. On the way, we deal with EAT procedure on amendments and new points. The judgment represents the views of all three members. We will refer to the parties as the Claimant and the Respondent.

Introduction

2. It is an appeal by the Claimant in those proceedings against a judgment of an Employment Tribunal sitting at Stratford, Chairman Ms V K Gay with Ms J Bond and Mr M Cunningham, registered with reasons on 8 August 2007. The Claimant was represented by Mr J Neckles described on the record as a “legal representative”. He is today represented by “a friend”, Mr Daniel Ibekwe. The Respondent was represented throughout by Mr Andrew Blake of Counsel.

3. The Claimant made claims of unfair dismissal put in three ways and of discrimination on the grounds of disability, race and sex discrimination. The Tribunal acknowledged that the essential issue was to determine, so far as the unfair dismissal claim was concerned, what was the effective date of termination and having done that to determine what the deadline was for submitting the claim. The Tribunal decided that the unfair dismissal claim was out of time. It left open the question of time in respect of the discrimination cases for a further PHR to be held in two days’ time on 31 October 2007. The Claimant appeals against the judgment dismissing his unfair dismissal claims. Directions sending this appeal to a full hearing were given in chambers by Elias J (President), prior to the Judgment in **Beasley v National Grid Electricity**

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The legislation

4. The legislation is not in dispute, Section 111 of the **Employment Rights Act 1996** provides as follows:

“(2) ... an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal —

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”

5. The Tribunal addressed itself as to the meaning of when a claim was presented, which means when it is received, and what is reasonably practicable it being a question of fact for an Employment Tribunal. The discretion which is left to a Tribunal occurs when it determines that it was *not* reasonably practicable for a claim to be presented, for then it must determine within what time it would have been reasonably practicable after the end of three months. That is not relevant in this case for the Respondent accepts that if the Tribunal were wrong on the first point then the time scale here is such as to command that the discretion be exercised. Time limits in respect of discrimination claims are left over for another day and we need not rehearse them.

The facts

6. There are no findings on the facts of the relationship between the parties but, for the purposes of the hearing, the Tribunal decided that the Claimant was dismissed on 30 June 2006 and thus the time for presenting his claim for unfair dismissal expired on 29 September 2006. Since there is an electronic method of presentation anything occurring on 29 September 2006 would be in time, anything on 30 September 2006 is out of time.

7. The Claimant did not attend the hearing. Mr Neckles did and gave evidence upon which he was cross-examined. The Tribunal described the set-up for presentation of claims as follows:

“9.1 The Employment Tribunal Service (as it then was) enables users to submit claim forms on-line. It has a website and associated systems for this purpose.

9.2 When a person wishes to complete and submit an Employment Tribunal claim form on-line, he has to go through certain stages. One of those stages is headed “Disclaimer” and beneath that the following is stated:

“Please be aware that there will be a delay between you submitting your claim and the relevant Tribunal office receiving it. You must bear this in mind when you are submitting a claim on the last day of the time limit that applies to your particular complaint(s).

Please confirm that you understand and accept this.”

Beneath that paragraph are two buttons marked accept and decline. The default mode is decline. If one tries to progress beyond that to complete a new ET1 form without accepting, the system prompts one to respond to the disclaimer positively. It appears impossible to get beyond this stage without accepting the disclaimer which gives notice of time delay.”

8. Mr Neckles gave evidence on four matters making it not reasonably practicable for the claim to be presented. On each of which, his account was examined, deconstructed and rejected. These concerned whether he had notice of the above disclaimer, had an untreated medical condition, had prepared the claim form from scratch at a 30 wpm typing speed and, when the claim form was submitted, had received an acknowledgment within time.

9. The facts in this case are stark. Mr Neckles pressed the submit button at 1 second to midnight, that is 23.59.59 on 29 September 2006 and it was received at 00.00.08, that is 8 seconds past midnight and is in fact 9 seconds late. The Tribunal held that it was reasonably practicable for the claim form to have been submitted in time. It criticised Mr Neckles for, even on his own case, which it had rejected, if he had a medical condition making it difficult for him to keep deadlines he should have proper systems in place once the Claimant had put him in charge of the case. The Tribunal found that both the Claimant and Mr Neckles were fully aware

of the deadline and it rejected the evidence presented by Mr Neckles and therefore the contention that it was not reasonably practicable.

10. During the course of the hearing the Tribunal resolved the issue which it had cited as being the effective date of termination in the following terms:

“9.4 Mr Neckles told the Tribunal that he knew that the effective date of termination was 30 June 2006. Both he and the claimant had known that at all material times. They had insisted upon that date and rejected any other date. The respondent had written a letter to the claimant on 14 July, asserting that the effective date of termination would be 15 August. However, the claimant replied on 22 July rejecting that date and saying that his employment had already been terminated with effect from 30 May. It is common ground that this was a clerical error and that he meant June. On the basis of all the documents seen and the information received, the tribunal accepts that the claimant was correct here (as also does the respondent).

It is obvious that had it accepted a termination date of 15 August 2006, the claim would have been in time.

The Claimant's case

11. Although a number of grounds were advanced in the Notice of Appeal, the primary ground is that the Tribunal failed to pay attention to the distance in time between the submission of the Notice of Appeal by Mr Neckles and the closure of the deadline, that was actually 1 second. Reliance is placed on **Capital Foods Retail Ltd v Corrigan** [1993] IRLR 430 EAT and **Camden and Islington Community Services NHS Trust v Kennedy** [1996] IRLR 381. Both of those indicate that a prudent adviser of a Claimant, when a claim is presented within the time scale, must check that it has been received and there must be systems in place for doing that. It is contended that the regime for time limits is overly strict and that the Tribunal did not consider the fairness of the position. It is also submitted that there should be an amendment to the Notice of Appeal to take issue with the finding as to the effective date of termination. The issue was raised at the Employment Tribunal and it is contended on behalf of Mr Neckles that

he would not have given away the essential issue on timing in the way that the Tribunal had found it.

12. This application to amend was made in writing to the EAT on 25 October 2006 together with Mr Ibekwe's skeleton argument but it was not served upon the Respondent until this morning, contrary to the directions in this appeal. Mr Blake did the best he could and responded to it. He has not sought to challenge by way of cross-examination the explanation given by Mr Ibekwe as to why this amendment was sought but to do so head on by a submission on the merits. It is submitted in the application on behalf of the Claimant that the Tribunal erred in, it is said, staying silent on the issue of effective date of termination and on that footing proceeded to determine the issue wrongly. The effective date of termination was 15 August 2006 or alternatively receipt of a letter 18 August 2006.

13. It is submitted that this amendment has merit and should be heard.

The Respondent's case

14. Mr Blake addressed us in relation to the application to amend which included as we will show an examination of the merits. He presented a skeleton argument on the substantive issue of reasonable practicability. We did not call upon to respond to the appeal.

The legal principles

15. The legal principles to be applied on the issue of reasonable practicability appear to us to emerge from the following authorities. In **Capital Foods** (above) it was held that a reasonable solicitor or adviser should take steps to check on the progress of a case. In **Beasley v National Grid** (above) Silber J gave a careful review of the authorities and applied the leading UKEAT/0486/07/JOJ

judgments of the Court of Appeal in Wall's Meat Co Ltd v Khan [1979] ICR 52 and Marks and Spencer Plc v William Ryan [2005] ICR 193 to enforce the rule against a Claimant 88 seconds out of time. The EAT said this:

“14. In Marks & Spencer v Williams Ryan [2005] IRLR 562, (which was referred to by the Employment Tribunal in this case) Lord Phillips M.R. in a judgment with which Latham and Keene LJ agreed, explained at paragraph 21 that:

“...it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an Employment Tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances”.

15. Lord Phillips then proceeded to say in the same paragraph of his judgment that:

“So far as that question is concerned, there is a typically lucid passage in the judgment of Brandon LJ in Wall's Meat Co Ltd v Khan [1979] ICR 52 at page 61 which I would commend:

"With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.

For this purpose, I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant.

While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries.”

16. It is essentially a question of fact for a Tribunal to determine what was reasonably practicable and it would not be overturned by an EAT unless it were perverse. An issue arises when there has been fault on the part of an adviser which, if the adviser is skilled, is pinned

upon the Claimant: see Dedman v British Building & Engineering Appliances Ltd [1974]

ICR 53 Lord Denning MR at page 61 E to H:

‘But what is the position if [the Claimant] goes to skilled advisers and they make a mistake? The English court has taken the view that the man must abide by their mistake. There was a case where a man was dismissed and went to his trade association for advice. They acted on his behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was ‘practicable’ for it to have been posted in time. He was not entitled to the benefit of the escape clause: see Hammond v Haigh Castle & Co Ltd [1973] ICR 148. I think that was right. If a man engages skilled advisers to act for him-and they mistake the time limit and present it too late-he is out. His remedy is against them.

Summing up, I would suggest that in every case the tribunal should inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the four weeks to pass by without presenting the complaint. If he was not at fault, nor his advisers -so that he had just cause or excuse for not presenting his complaint within the four weeks - then it was “not practicable” for him to present it within that time. The court has then a discretion to allow it to be presented out of time, if it thinks it right to do so. But, if he was at fault, or if his advisers were at fault, in allowing the four weeks to slip by, he must take the consequences. By exercising reasonable diligence, the complaint could and should have been presented in time.”

17. As to the admission of an amended Notice of Appeal, the judgment of the EAT HHJ Serota QC and members in Khudados v Leggate [2005] ICR 1013 is relevant where this appears:

“86. The EAT has a broad and generous discretion in applying its Rules and Practices so as to achieve the overriding objective of dealing with cases justly. We consider that, without wishing to set out an exhaustive list of considerations, the following are among the matters to be taken into account in determining whether or not an amendment should be allowed.

- a) Whether the applicant is in breach of the Rules or Practice Directions; in our opinion compliance with the requirement in paragraph in 2 (6) of the Practice Direction that an application for permission to amend a Notice of Appeal be made as soon as the need for amendment is known, is of considerable importance. The requirement is not simply aspirational or an expression of hope. It does not set a target but is a requirement that must be met in order to advance the efficient and speedy dispatch and conduct of appeals.
- b) Any extension of time is an indulgence and the EAT is entitled to a full honest and acceptable explanation for any delay or failure to comply with the Rules or Practice Direction, as Mummery J observed in Abdelghafar.
- c) The extent to which, if any, the proposed amendment if allowed would cause any delay. Clearly proposed amendments that raise a crisp point of law closely related to existing grounds of appeal, or offering limited particulars that flesh out existing grounds, are much more likely to be allowed than wholly new grounds of perversity raising issues of complex fact and requiring consideration of a volume of documents, including witness statements and notes of evidence. Such amendments if allowed are bound to cause delay and extra expense. The latter class of amendments should be contrasted with the first. In many cases in the first category the party against whom permission to amend is sought will be in no worse position than if the amended grounds had been included in the original Notice of Appeal.
- d) Whether allowing the amendment will cause prejudice to the opposite party, and whether refusing the amendment will cause prejudice to the Applicant by depriving him of fairly arguable grounds of appeal. We recognise that a party cannot be prejudiced in point of law simply because an argument is raised by way of amendment that saves what would otherwise be an unsustainable appeal. We also would suggest that the prejudice

caused by refusing permission to amend to an Applicant who seeks permission to amend by adding fairly arguable grounds, but who has failed in a significant way to comply with the Rules or Practice Direction, or who has delayed excessively, is likely to carry less weight than in the case of an Applicant who has not delayed and has acted in accordance with the Rules and Practice Direction.

e) In some cases it may be necessary to consider the merits of the proposed amendments, assuming they can be demonstrated to cross the appropriate thresholds we have mentioned earlier; that is to say as a general rule they must raise a point of law which gives the appeal a reasonable prospect of success at a full hearing.

f) Regard must be had to the public interest in ensuring that business in the EAT is conducted expeditiously and that its resources are used efficiently.”

18. When an issue has been conceded at an Employment Tribunal the basis upon which the EAT will allow the concession to be unpicked is described in Secretary of State v Rance [2007] IRLR 665. Only exceptionally will a new point be allowed to be advanced even if it is sought to undo a concession which was wrongly made; see Mensah v E Herts NHS Trust [1998] IRLR 531 CA. When a Notice of Appeal is late and the Registrar has to consider reasons to exercise her discretion (or a judge on appeal from her), it is often useful to hear evidence and for the witness to be cross-examined particularly where the person making the submission is also a witness: Muschett and others UKEATPA 0281/07

Discussion and conclusions

Amendment of the Notice of Appeal

19. With those principles in mind, we turn first to the application to amend the Notice of Appeal. In our judgment, it does not cross the threshold set by the EAT in Khudados. Mr Ibekwe submits that he made the application as soon as he knew of the need. Mr Neckles, before he left on one of two visits to Nigeria, had left with Mr Ibekwe two lever arch files on 16 October. The application was made on 25 October and we think lodged the day after, but not served on the Respondent. That is not acting quickly or properly.

20. Secondly, it is contended by Mr Blake, without cross-examination of Mr Ibekwe as to whether the explanation is *full and honest*, that there is no *acceptable* explanation for the delay or failure to comply. Mr Ibekwe drafted and submitted the Notice of Appeal and he was alert to the issues which had been raised at the Employment Tribunal. He had all the relevant documents. We agree.

21. Thirdly, if the amendment were allowed it would cause a delay. We are in the shadow of the Employment Tribunal's resumption on Wednesday. If this matter were to be properly canvassed so that Mr Blake had time to prepare, it would be put back for another EAT hearing. Alternatively, on one of the scenarios advanced by Mr Ibekwe, the point could be put to the Employment Tribunal so that it could answer before we resume. That too would involve a delay.

22. Fourthly, on the issue of prejudice, although Mr Blake is acting free on behalf of the Respondent Trust and there will be no costs, there inevitably will be some prejudice to the Respondent in allowing the matter to be heard at a later date. That involves the time which is given by the officers of the Trust and solicitors who also give their time free. We accept that there will be prejudice to the Claimant in refusing the application because if it succeeded this ground of appeal would be a complete answer.

23. Fifthly, we have been addressed on the merits and it is acknowledged that in certain cases that is appropriate. The amended Notice of Appeal itself operates on a false premise, that is that the Tribunal has stayed silent on the issue of effective date of termination which it had set out in advance as an issue. That is wrong. The Tribunal did determine that in its paragraph 9.4. It did so partly on the basis of a concession by the Claimant. The Tribunal determined it

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once it had read the documents and heard what the Claimant said about it. It was 30 June 2006. Insofar as it is necessary in certain cases to look at the merits, there is none.

24. Finally the public interest must be served in ensuring that the business of the Appeal Tribunal is conducted expeditiously and its resources are used efficiently. If this case were to be held off for another day then those in the queue outside our court would have to wait that much longer. In our judgment, the application for an amendment should be refused. The material which was available to Mr Ibekwe was perfectly exigible

25. Lest we are wrong, before making that decision we determined that it would cost little extra of our time to hear the advocates on the merits of the amended notice, applying the old money term *de bene esse* which we interpret as *let's get on with it*. As they both argued the merits to the satisfaction of themselves when dealing with the application to amend, neither of them took the opportunity to make further submissions. So we are able, on the material presented to us and from the arguments which we have summarised above, to conclude that the Tribunal did correctly determine that the effective date of termination was 30 June 2006. We will not allow the concession made by the Claimant to be unpicked. It would require remission to the Employment Tribunal and that is a significant ground for refusing it pursuant to the judgment in **Secretary of State v Rance** (above). The Tribunal would have to make findings. It indicated that it had some correspondence but not all. We do not have all of the correspondence, in particular we still do not have the letter of 22 July and all of that would require remission to the Employment Tribunal. That is sufficient reason for us to refuse to allow this conceded point to be re-opened.

26. In any event, absent the concession, the issue had been determined on the claim and response forms, for the Claimant there asserted that he was dismissed on 30 June 2006 and the Respondent accepted that. It is true that the Claimant hedges his bets by reference to a letter which the Respondent accepts may have caused some confusion - an attempt by the Respondent to extend the employment to 15 August 2006. That was rejected by the Claimant. It is significant that the amended Notice of Appeal cites the letters bringing the relationship to an end on 30 June and 15 August but what is missing is the letter which was before the Employment Tribunal but has not been put before us. The gist is that the Claimant rejected the offer to extend the employment until 15 August 2006 and asserted his right to rely on the letter which brought the relationship to an end on 30 June. Having heard such argument and considered the documents irrespective of the concession, although there may have been some confusion about the correspondence, we would if necessary to our Judgment hold there is no error of law in the Tribunal's conclusion that the effective date of termination as a matter of statute was 30 June 2006.

Reasonably practicable

27. We then turn to the reasonable practicability point, the only issue sent by Elias J to this hearing. The obvious point is that this is a question of fact for the Employment Tribunal. Having rejected four successive excuses given by Mr Neckles, the Tribunal had a way open to it to determine the simple issue of reasonable practicability. There is nothing in the point that Mr Neckles was deprived of his opportunity between submission of the internet form and deadline to enquire as to what happened to it, given that he only allowed one second for that to occur and not, in cases like **Capital Food** (above) a period of weeks. The Tribunal reached a decision on the facts that it was reasonably practicable to present the claim within the time.

28. This was a careful judgment of a very experienced three person Tribunal. It has justified each of the four findings against Mr Neckles, which it made quite properly in the context of looking at where fault lay as well as other facts. The appeal is dismissed.

The Compensation Act 2006

29. We add this in relation to the regime which now applies in Employment Tribunals and in the EAT set up by the **Compensation Act 2006** Section 4(1)(2)(a). This covers people who provide advice or other services on claims for reward. Regulations were made in December 2006 and brought into effect on 23 April 2007 which define who are authorised to make such claims on behalf of Claimants. They include, of course, lawyers, trade unions, charities and the MIB. Mr Neckles, recently graduated in law at the time of the Employment Tribunal hearing appears not to fall within the Regulations. Before the statutory regime was in place, when he made the out of time claim, he was a second year law student subsidising his education by making half a dozen claims and charging £120 per hour. He was at fault as the claim was not put in on time.

30. Mr Ibekwe was at pains in his submissions to make this point: in **Khudados** the unlucky Appellant had been represented by lawyers whereas he, Mr Ibekwe, was representing as a friend and is not regulated by the Compensation Act regime. He says he did not know that Mr Neckles was representing for a fee, notwithstanding that the amount of his fee is recorded in the judgment. Mr Neckles and Mr Ibekwe give the same address. The underlying submission is that where solicitors are involved and there is fault, a claim in negligence could follow and the solicitors are insured and that may be relevant. The logic is that if Mr Neckles is at fault, not a professional and not insured, time should be extended so as to expose the Respondent to a claim. That is not a factor that we can have in our mind since neither we nor the Employment UKEAT/0486/07/JOJ

Tribunal are exercising a discretion. It is not a proper factor. We do however have in mind, without making any findings, that Mr Neckles would appear today to be an unregulated representative, and therefore there may be consequences for him and for the Claimant. This point was not taken by Mr Blake who was unaware of the Act but we draw it to the attention of the parties now because this case is going back to the Employment Tribunal on Wednesday and the Claimant must consider representation. There is a notice in the hallway of the EAT and we assume of the Employment Tribunal advising Claimants that if they are to be represented or to receive advice it should be from a person authorised under the Compensation Act and that those who provide those services unauthorised, or pretend to be authorised, commit an offence for which the punishment on conviction on indictment is two years' imprisonment. Since the Claimant did not attend he would not have seen this and may be unaware of his rights. Although the events in this case occurred before the statutory regime was in place, the hearing at the Employment Tribunal where Mr Neckles appeared and put himself on the record as a legal representative occurred after, and he has since made an application to the Employment Tribunal in relation to the resumed hearing on Wednesday.

31. We would very much like to thank Mr Ibekwe, himself like Mr Neckles an experienced advocate before the Employment Tribunals and the EAT, for his submissions and Mr Blake for his written argument, and his oral submissions on the application. The application to amend and the appeal are dismissed.

32. In the light of our concerns, we will refer the Judgment and the papers to the Regulator of Regulated Claims Management Services, who is Rt Hon Jack Straw MP, Secretary of State for Justice.

