Appeal No. UKEAT/0019/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 10 April 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

DHL SUPPLY CHAIN LIMITED — APPELLANT

MR S FAZACKERLEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM GILLIE (of Counsel) Instructed by: DAC Beachcroft LLP 3 Hardman Street Manchester M3 3HF
For the Respondent	MS MARTA WISNIEWSKA (Lay Representative)

SUMMARY

JURISDICTIONAL POINTS - Extension of time: reasonably practicable

JURISDICTIONAL POINTS - Extension of time: just and equitable

An Employment Tribunal was entitled to find, on the evidence before it, that it had not been reasonably practicable for a Claimant to have served proceedings within the relevant time limit, that he had done so within a reasonable period after learning of the time limits.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this Judgment I shall refer to the parties as they were before the Employment Tribunal ("ET"). Both parties were represented today by those who represented them below; the Claimant by Ms Wisniewska, an employment consultant, and the Respondent by Mr Gillie of counsel. Each has provided a helpful and very useful skeleton argument. Mr Gillie's submissions were focused and helpful. I have had regard to them in full when considering my decision but in order to hand down Judgment *ex tempore* today, I will not set them out in detail. I pay tribute to Ms Wisniewska who is, she tells me appearing for the first time in this Tribunal.

2. This is an appeal by the Respondent against the Decision of Employment Judge Bloom sitting at the ET in Cambridge, when he held that it was not reasonably practicable for the Claimant to present his claims of unfair and wrongful dismissal within the three-month statutory time period provided by section 111 of the **Employment Rights Act 1996**, adjusted by virtue of the early conciliation procedure. The case was put through to a Full Hearing by His Honour Peter Clark at the sift stage when he said, in characteristically succinct language, it is arguable that the Employment Judge failed to apply the test of reasonable ignorance to the facts found.

3. The Claimant was dismissed by his employer, the Respondent, for gross misconduct following a disciplinary hearing; the dismissal being effective from 15 March 2017. He appealed and as the ET found, through no fault on the part on either party, the appeal hearing did not take place until 22 June 2017, on which date the Claimant was told that his appeal had not been successful. Shortly after that date, the Claimant took advice and commenced proceedings by lodging an ET1 on 19 July 2017. It was out of time.

4. The Employment Judge found, and it is not challenged, having taken advice from Ms Wisniewska, there was no unreasonable delay thereafter. However, in circumstances set out in the Written Reasons of the Employment Judge, the Claimant had contacted ACAS some days after his dismissal. The Employment Judge's findings about this were set out in paragraphs 7 to 13 of his Reasons:

> **"7. I have heard evidence on oath from the Claimant. It is not disputed that the Claimant was told by letter dated 16 March 2017 that his employment had been terminated summarily the previous day. He was advised of his right to lodge an internal appeal against that dismissal and he did so by virtue of a letter dated 29 March 2017. In that letter he refers to a "legal outcome" but I am satisfied having heard evidence from him that he was referring to a conversation he had with a colleague rather than having taken any advice, particularly advice from a professional with regard to bringing any employment tribunal proceedings.**
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> **8. Through no fault of the Claimant and I say equally no fault of the Respondent the appeal process was subsequently delayed after the Respondent accepted a submission from the Claimant that the identity of the manager conducting the appeal should be changed. With holiday commitments and so on again through no fault of either party the first stage of the appeal took place on the 4 May 2017. It was adjourned, again through no fault of either party, to its final determination date on 22 June 2017. At the end of the appeal hearing on that day the Claimant was told that his appeal had failed.**
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> **9. About four days or so after receiving the letter of dismissal on 16 March 2017 the Claimant had contacted the ACAS helpline for advice. I am satisfied that what he told me took place during the course of that telephone conversation is all that he was told. He was advised by the ACAS advisor that prior to considering any other form of action including tribunal proceedings that he should first exhaust an internal appeal process. No reference was made to obtaining an early conciliation certificate or bringing a tribunal claim within a statutory 3 month period. The Claimant did not seek any further advice and I accept that it was reasonable enough for him to have approached the matter thereafter on the basis of the information given to him by ACAS which was of course incorrect. The fact an internal appeal process is continuing and even where that internal process is delayed for a reason is not in itself a sufficient reason to justify a finding that it was not reasonably practicable to present a complaint within the statutory time period. I have taken into account the authority of *Palmer v Southend on Sea Borough Council* [1984] 1 WLR 1129.**
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> **10. Had it been the case that the Claimant was simply awaiting the outcome of the appeal prior to bringing the claim I would have no hesitation in concluding that the claim should have been brought within the 3 month statutory time period, in other words I would not have been satisfied that it was not reasonably practicable under those circumstances alone for the claim to have been brought within the statutory period. However, what is different to this case and what is an additional point that is clearly something for me to take into account is the erroneous advice given to the Claimant by the ACAS advisor namely to await the outcome of the appeal (whether it was delayed or not) prior to presenting a claim to an employment tribunal.**
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> **11. In that regard I did bring to both parties attention, albeit a first instant case, of *Drury v Carphone Warehouse Limited* [ET] Case No 3203057/2006 which has almost identical facts to this case. This is not a case where the Claimant received advice from any other professional advisor. He took the word of ACAS and decided to await the outcome of the internal appeal process prior to instituting employment tribunal proceedings. He had not been advised of the statutory time period.**
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> **12. On that basis I am satisfied that it was not reasonably practicable for the [Claimant] to bring the claim within the 3 month statutory time period. He took the word of ACAS that he should await the outcome of the internal appeal process before proceeding. Through no fault of his own he only knew of the outcome of that appeal on the 22 June 2017. Four days after that he took proper advice from Ms Wisniewska and went through the ACAS early conciliation process and shortly after obtaining the relevant certificate he presented his claim**

to this employment tribunal. There was no further unreasonable delay after the certificate was presented.

13. Consequently in my judgment I am satisfied that it was not reasonably practicable on the facts for the Claimant to present his claim within the 3 month statutory time limit and consequently his claims of both unfair dismissal and breach of contract shall proceed to a full hearing for their merits to be determined."

5. Pursuant to paragraph 5 of the Order made following the sending of this case to a Full Hearing, an agreed note of evidence has been provided. It reads as follows:

"*Evidence in Chief*

2. The Claimant's representative asked whether he sought legal advice. He said he rang the people at ACAS who advised him to exhaust the appeal process before doing anything else. He contacted ACAS a few days after he was dismissed on the general ACAS helpline. They advised him to exhaust the appeal before going any further litigation [sic].

3. The Claimant's representative asked if ACAS had told the Claimant about the 3 month limitation rule. The Claimant said he did not recall this information. He said that the main point of the call was to do what they said and to exhaust the appeal process.

4. Employment Judge Bloom asked if the Claimant did any research on the internet or do any other research. The Claimant said no, he had not. He got advice from ACAS. He did not do research. He had not really been near unfair dismissal before. ACAS informed him that he should not launch legal action until the appeal had been completed. The result of the appeal was a disappointment.

Cross-examination

5. In cross-examination, the Claimant said that his reference to "legal outcomes" in his appeal letter was a reference to challenging his dismissal ("wrongful dismissal") in a Tribunal. The Claimant said he drafted the appeal letter with help from his friend who was more senior in the organisation than him, but that he did not discuss making an ET claim at any point with his friend.

6. The Claimant said that he did not talk to ACAS about anything to do with instituting an ET claim as the conversation was all about the internal appeal. He said he did not ask ACAS about how to institute an appeal."

6. The case law on the reasonably practicable test is of considerable antiquity. I have been taken to a number of the well-known cases by Mr Gillie and I mean no disrespect to him by saying that the relevant principles seem to me to have been distilled in the judgment of Lord Phillips (then Master of the Rolls) in **Marks & Spencer plc v Williams-Ryan** [2005] ICR 1293 at paragraphs 19 to 21 and (as the effect of advice from an entity other than a firm of solicitors) paragraphs 31 and 32:

"19. An appeal to this court, and indeed to the Employment Appeal Tribunal, only lies on a point of law. It is not for this court to review the employment tribunal's findings of fact, unless it is alleged that there is no basis upon which they could be reached so that they were perverse. It is necessary to identify the relevant legal principles that apply to section 111(2)

and then to consider whether those principles were correctly applied by the employment tribunal. I propose first to set out some principles which are not controversial.

20. The first principle is that section 111(2) should be given a liberal interpretation in favour of the employee. Lord Denning MR so held in *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53. In that case the relevant provision was more draconian than section 111(2), in that it required a complaint to the employment tribunal to be made within four weeks of the dismissal unless the employment tribunal was satisfied that this was not "practicable". When the provision was changed to its present form, the Employment Appeal Tribunal held that the same approach to construction should be adopted (see *Palmer* [1984] ICR 372, 381) and, so far as I am aware, that approach has never been questioned.

21. In accordance with that approach 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. 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, 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.**
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> **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.**
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> **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 necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries."**

…

31. What proposition of law is established by these authorities? The passage I quoted from Lord Denning's judgment in *Dedman* [1974] ICR 53 was part of the ratio. There the employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an employment tribunal.

32. The observations of Stephenson LJ in *Riley* [1980] ICR 323 were, as I said, obiter. There is no binding authority which extends the principle in *Dedman* [1974] ICR 53 to a situation where advice is given by a Citizens Advice Bureau. I would hesitate to say that an employee can never pray in aid the fact that he was misled by advice from someone at a Citizens Advice Bureau. It seems to me that this may well depend on who it was who gave the advice and in what circumstances. Certainly, the mere fact of seeking advice from a Citizens Advice Bureau cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application to an employment tribunal. Indeed, Ms Callaghan did not so suggest."

7. I also record that Mr Gillie relied upon the strictures of Mr Justice Wood, giving the judgment of this Tribunal, in **Trevelyans (Birmingham) Ltd v Norton** [1991] ICR 488 when he said at page 491E that "it is the duty of an industrial tribunal to make detailed and exhaustive inquiries of the applicant once it is established that he had knowledge of his rights". Mr Gillie points out the limitations of the inquiry made of the Claimant by the Employment Judge as recorded in the agreed note of evidence.

8. Two other cases to which I have been referred and which are, in my judgment, of relevance, are decisions of this Tribunal. One is the decision of His Honour Judge Birtles in **Remploy Ltd v Brain** UKEAT/0465/10, paragraphs 18 and 19:

> **"18. Furthermore, it is important to bear in mind that the question of what is or what is not reasonably practicable is essentially one of fact for the Employment Tribunal to decide and that appellate courts will be slow to interfere with the Tribunal's decision. In this case there was evidence before the Employment Judge that the Claimant had taken advice from a solicitor:**
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> > **"[…] who professed some experience in employment law and agreed to meet the Claimant informally over a cup of coffee. The Claimant did not pay the solicitor. The gist of the information she was given is that she should follow the internal procedures first."**
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> **19. Following *Riley* it does not seem to me to matter that the solicitor was not retained by the Claimant or that she did not pay him for the advice. The fact was she believed him to have experience in employment law and she was given specific advice to pursue the internal appeal first. Acting on that advice that is what she did. In those circumstances it seems to me that it was open to the Employment Judge to conclude (having taken all other material factors into account) that it was not reasonably practicable for this particular Claimant to bring her claim within the three-month period because she was pursuing the internal appeal (which she did)."**

9. Finally, the decision of Mr Justice Underhill (then President of this Appeal Tribunal) in **John Lewis Partnership v Charman** UKEAT/0079/11. That was a case where the Claimant was held by the Employment Judge to have been entirely ignorant of the existence of the right to claim for unfair dismissal, at paragraph 5, and concluded, at paragraph 11 of the judgment of the Employment Appeal Tribunal:

> **"5. On the basis of his findings the Judge held that the Claimant's ignorance of the time limits rendered it impracticable for him to bring proceedings in time. He did not expressly consider the question of whether that ignorance was reasonable, but it can be inferred that he took the view that it was reasonable for a lay person to defer investigating the possibility of a recourse to law until the appeal process was concluded.**

A

...

11. On that basis the Judge's finding of reasonableness, if (as I think) he is to be held to have made one, is unassailable unless it is perverse. So far from being perverse, I think that it was plainly right. There is an obvious good sense in a party awaiting the outcome of an internal appeal before resorting to legal proceedings. It is to be noted that the Judges applying the reasonable practicability test in cases of this kind have often taken the opportunity to question whether the result which they felt obliged to reach was sensible: see per Sir John Brightman in *Singh* at pages 440-1, Sir Hugh Griffiths in *McDonald v South Cambridgeshire Rural District Council* [1973] ICR 611, at page 615E-F, and indeed Browne-Wilkinson J himself in *Bodha*, at page 205F-G. That being so, I cannot see that, subject to the *Bodha* point, it was unreasonable for the Claimant in the present case to defer investigating the position about a possible employment tribunal claim until he knew the outcome of the appeal. For the same reason, if I have been too charitable to the Judge in holding that he implicitly made a finding of reasonableness, I would myself in any event reach such a finding: Mr Forshaw sensibly accepted that if the Judge misdirected himself the relevant issue could and should be determined by me."

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C

10. I mention that case in particular, as it does point to an approach which perhaps is not as strict as set out by another composition of this Tribunal in **Trevelyan**, albeit in a different context. Ultimately, each case will turn on its own facts.

D

11. I set out the grounds of appeal in brief. I am summarising them but have had regard, when reaching my decision, to the precise wording as set out and repeated in the skeleton argument of the Respondent.

E

12. Ground 1 asserts that the Employment Judge failed to apply the principles of law set out in the cases above. In particular, it is argued that the Claimant did not ask ACAS about how to institute a claim in the ET and the Employment Judge ought to have considered the fact that the Claimant had had the opportunity to ask more questions than he did. It is argued that the ET should have made further inquiries about time limits, in particular as it was established, unlike in the **John Lewis Partnership** case, that he was aware of a right to challenge his dismissal in a Tribunal.

F

G

13. Ground 2 asserts that the advice given by ACAS was not necessarily incorrect and that the findings in this regard were an error of law and or were perverse.

H

14. Ground 3 asserts that the ET erred in law in finding that the Claimant's reliance on ACAS' advice to exhaust internal appeals before making a claim was a matter rendering it not reasonably practicable to lodge the claim in time. I remind myself of the dictum of Mr Justice Elias in **ASLEF v Brady** [2006] IRLR 576 at paragraph 55 when he said:

> **"55. … The EAT must respect the factual findings of the employment tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine tooth comb' to subject the reasons of the employment tribunal to unrealistically detailed scrutiny so as to find artificial defects; …"**

15. It seems to me that on a fair reading of the Reasons, and in particular paragraphs 9 and 10, the Employment Judge was entitled to take the view that the advice given by ACAS was erroneous. That advice was that, prior to commencing Tribunal's proceedings, the Claimant should first exhaust internal procedures. Paragraph 10 records, correctly, that simply to await the outcome of an appeal could not have resulted in a finding of reasonable practicability but the ACAS advice, albeit limited in scope, was relied upon and tipped the balance. The Employment Judge asked the Claimant about other inquiries but, given the answers which I have seen, it then becomes a matter for the Judge's determination of the matter in all the circumstances.

16. As far as ground 2 is concerned, I accept that the advice held by the Employment Judge to have been given by ACAS might not have been erroneous in the sense that most appeals against dismissal are indeed dealt with speedily. However, as an unqualified statement, it most certainly was erroneous and I therefore disagree that it was an error of law to form the view of the ACAS advice that the Employment Judge did.

17. Turning to ground 3, I find that there was no error of law in holding as the Employment Judge did that the ACAS advice was something that rendered it not reasonably practicable to

bring his claim within the primary time limit. Once the advice had been given, the Claimant simply did not take matters further. It seems to me that a different Judge might have taken a different view but as Mr Justice Underhill said in **Charman**, the Judge's finding is unassailable unless it is perverse. Perversity engages a high hurdle, which has not nearly been reached in this case. Although the facts of this case are at a considerable remove from **Charman**, the principle that having been given certain information a Claimant deferred investigating further is broadly applicable.

18. Whilst I am not entirely comfortable with the Employment Judge's apparent reliance on a similar case before another ET with no more than a reference in a legal text - and I note that nobody has since been able to find more details about the case - it would not in any event bind me any more than it would the Judge below. I have formed the view that this does not infect the conclusions that he had already reached. It seems to me that he was using the case to support the legitimacy of his own conclusions.

19. I accept that the Judge's reference to authority in the field was relatively brief but, in my judgment, I consider that he clearly had in mind the relevant principles and permissibly applied them to the facts as he found them and was entitled to find them to be, and I therefore refuse this appeal.