Appeal No. UKEAT/0028/15/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 May 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MRS A ASLAM — APPELLANT

TRAVELEX UK LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRIS LLOYD-ELEY (Representative)
For the Respondent	MR TOM CROSS (of Counsel) Instructed by: Doyle Clayton Solicitors Ltd One Crown Court Cheapside London EC2V 6LR

SUMMARY

PRACTICE AND PROCEDURE - Review

Rule 40(5) of the **Employment Tribunal Rules 2013** - refusal of application for re-instatement of a claim following failure to pay fee or submit fee remission application. *Held*: the Employment Judge gave sufficient reasons for her decision, and her decision was not perverse or tainted by any legal error. As to quality of reasons, **Neary v Governing Body of St Albans School** and **Thind v Salvesen Logistics** considered. Applications to adduce fresh evidence and amend Notice of Appeal dismissed.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This appeal arises from a claim brought by Ms Assia Aslam ("the Claimant") against Travelex UK Ltd ("the Respondent"). Her claim was dismissed in October 2014 because she did not pay a hearing fee or submit a remission application. By letter dated 31 October 2014 Employment Judge Hill refused her application for reinstatement of the claim. She appeals against that refusal.

2. The principal ground of appeal relates to the sufficiency of the reasons given by the Employment Judge for her decision. The reasons were brief. Was any more required? It is also argued that the Employment Judge's decision was perverse and contrary to the interest of justice. Further, the Claimant seeks to admit fresh evidence in support of her appeal.

The Background Facts

3. The Claimant was employed by the Respondent as a Sales Consultant between 20 June 2012 and her dismissal with effect from 21 February 2014. In May 2014 she brought proceedings claiming unfair dismissal, discrimination on the grounds of pregnancy/maternity and for alleged arrears of pay and holiday pay. The Respondent resisted those proceedings saying that the Claimant was fairly dismissed by reason of her failure to follow procedure with regard to reporting her absence.

4. Initially the Claimant was represented by an organisation called Greenford Law LLP, whose details were given on her ET1 claim form. An application for remission of the issue fee payable with the claim was duly made.

5. On 12 September 2014 a Preliminary Hearing took place. Mr Vivek Khanna appeared to represent the Claimant. Directions were given including a direction for exchange of witness statements on 14 October 2014. The hearing was listed to take place on 28-29 October 2014. The formal order setting out the directions and listing the hearing was sent to the parties on 7 October 2014.

6. On 24 September 2014 an organisation called "The Law Clinic" replaced the Greenford Law Centre as the Claimant's notified representative. Mr Vivek Khanna was the individual notified as the reference at that organisation. The Employment Tribunal confirmed by letter dated 25 September that it would send correspondence to the Law Clinic's address, as had been requested, and there is no reason to doubt that it did so.

7. By late September 2014 the Respondent's solicitors, Doyle Clayton Solicitors Ltd, were aware of the Claimant's new representative. There was a telephone call on 30 September. The solicitors sent Mr Khanna the Respondent's list of documents. There was further contact on 14 October, the day when exchange of witness statements was due. After a telephone conversation Mr Khanna emailed to confirm that he would be ready to exchange the following day. He was asked whether his client had paid the hearing fee. He emailed to say he would take instructions.

8. In fact, on 15 October, Mr Khanna was not ready for exchange. He applied for an extension of time for service of a witness statement until 21 October. He gave as the reason for non-compliance that the Claimant had a young baby in the maternity period, was breastfeeding, could not arrange childcare and had found it difficult to provide a statement in time. The Respondent's solicitors did not object to a short extension of time until 21 October 2014, which would have been just a week before the hearing. An Employment Judge granted that extension

of time, making it plain that the parties could only rely on witness statements which were served by 4pm on 21 October. The Respondent served its witness statements by that date. No witness statement was served by or on behalf of the Claimant.

9. In the meantime the Employment Tribunal had been writing to Mr Khanna's address concerning the hearing fee. By notice dated 7 October 2014 the Employment Tribunal stated that a hearing fee of £950 was due and that the Claimant was required to pay it or submit a remission application no later than 14 October 2014. By letter dated 15 October 2014 the Employment Tribunal stated that unless payment was made or a remission application submitted within seven calendar days "your Fee - Hearing will be rejected or dismissed accordingly". Finally, by letter dated 23 October 2014 the Employment Tribunal issued a Notice of Dismissal for non-payment of fee dismissing the claim and vacating the hearing listed for 28 and 29 October.

The Application to Reinstate

10. By email dated 27 October Greenford Law Centre wrote to the Employment Tribunal asking for reinstatement of the Claimant's claim. The Rule quoted was incorrect. The Employment Judge correctly applied Rule 40 of the **Employment Tribunal Rules 2013**, and no complaint is made by either side about this.

11. The grounds put forward by Greenford Law Centre were the following:

> **"We would be very grateful if you could consider the representatives reasons [sic] for non-compliance with the Unless Order. The representative, namely Mr Vivek Khanna of The Law Clinic suffered from an illness which would cause detriment to our clients case [sic]. Furthermore, the representative was in hospital and could not inform the tribunal at that time.**
>
> **…**
>
> **The representatives failure [sic] to comply was non-intentional and there is a good explanation for this failure. The application will be supported by the documentation which will be provided as soon as possible which will justify our reasons for failure to comply."**

12. Attached to that email was a document dated 27 October 2014. It is described as a duplicate copy of a statement of fitness for work, signed by a GP on 27 October 2014, advising Mr Khanna that he was unfit for work for three months commencing on 16 September 2014 by reason of depression. There was nothing to indicate that Mr Khanna had been or was in hospital.

13. By letter dated 29 October 2014 the Respondent's solicitors wrote to the Employment Tribunal opposing the application. They set out the history of the matter, emphasising that Mr Khanna had been in communication with them and they had specifically enquired about the hearing fee on 15 October. They pointed out that his sickness certificate gave a date of unfitness for work prior to the time when his organisation had come on the record. They pointed out that no witness statement had been served and that the hearing was listed for two days, well within the apparent currency of Mr Khanna's sickness certificate.

14. By letter dated 31 October Employment Judge Hill's decision was given in the following terms:

> **"The application for reinstatement of the claim under r40(5) of the Employment Tribunal (Procedure) Regulations 2013 is refused.**
>
> **Although the claimant's representative now asserts the then representative was in hospital, it is clear that throughout the period of the sick note provided that representative continued to correspond with the Tribunal and the respondent, but not to pursue the claim actively.**
>
> **It would be not in the interest of justice to reinstate the claim."**

15. For completeness I should mention that an out-of-time application was made to Employment Judge Hill to reconsider her decision based on fresh evidence of the kind which it is sought to admit before me. By letter dated 16 April 2015 she refused the application. She observed that the medical evidence simply served to confirm that the representative was ill and that the application was made out of time.

Submissions

16. On behalf of the Claimant, Mr Lloyd-Eley submits that: (1) the Employment Tribunal has failed to provide any adequate reasons as to how the decision was in the interest of justice; (2) the Employment Tribunal did not have adequate regard to the fact that the Claimant was represented by a pro bono sole practitioner who fell ill; (3) the Employment Tribunal did not have adequate regard to the fact that the Claimant was entitled to fee remission. He supports the grounds put in the Notice of Appeal to the effect that the decision was unreasoned, perverse and contrary to the interest of justice.

17. Mr Lloyd-Eley also applied to the Employment Appeal Tribunal to admit as fresh evidence four documents. Of these the most important, and the one he pressed the furthest, was a statement by Mr Khanna himself. He drew from this statement, in particular, the point that Mr Khanna had according to that statement been too unwell to visit his office. He had therefore not received the notices relating to fees which had been sent by post and had not informed the Claimant of them.

18. On behalf of the Respondent, Mr Cross submits that the Employment Judge's reasons were sufficient. He drew attention to Rule 62(4) of the **Employment Tribunal Rules** to the effect that reasons given for any decision should be "proportionate to the significance of the issue and for decisions other than judgments may be very short". He submitted that **Neary v Governing Body of St Albans Girls School** [2010] ICR 473, to which I have referred the parties, provided support for this approach. He relied on a dictum of Keene J in **Derby Specialist Fabricating Ltd v Burton** [2001] ICR 833 for the proposition that the Employment Judge was not required to spell out in detail arguments and issues known to the parties. The

Employment Judge's decision could not be described as perverse. The Employment Judge was entitled to take the view that it was not in the interest of justice to reinstate the case.

19. Mr Cross submitted that a freestanding application to the Employment Appeal Tribunal to adduce further evidence in circumstances such as these was not appropriate (see the **Employment Appeal Tribunal Practice Direction** at paragraph 10.1 and **Korashi v Abertawe Bro Morgannwg ULHB** [2012] IRLR 4 at paragraphs 114 to 122 and 132). Faced with this difficulty Mr Lloyd-Eley made an application for permission to amend the Notice of Appeal so as to appeal against the Reconsideration Decision in April 2015. That application was opposed by Mr Cross, not least because it was made so late that it would effectively require a second hearing.

Statutory Provisions

20. Employment Tribunal fees are payable by virtue of **The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013**. The hearing fee stated by the Employment Tribunal was the correct fee for a Type B claim of the kind which the Claimant had made: see Schedule 2, Table 3. Article 4(1)(a) of the **Fees Order** makes provision for a fee, the hearing fee, to be payable "on a date specified in a notice accompanying the notification of the listing of a final hearing of the claim". In this case the notice was on 7 October and provided for the fee to be payable in seven days. I am told that this is the standard time to be given.

21. As to payment of fees the applicable Rule is Rule 40 of the **Employment Tribunal Rules 2013**, which are to be found in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. So far as applicable, Rule 40 provides as follows:

"40. *Non-payment of fees*

(1) … where a party has not paid a relevant Tribunal fee or presented a remission application in respect of that fee the Tribunal will send the party a notice specifying a date for payment of the Tribunal fee or presentation of a remission application.

(2) If at the date specified in a notice sent under paragraph (1) the party has not paid the Tribunal fee and no remission application in respect of that fee has been presented -

(a) where the Tribunal fee is payable in relation to a claim, the claim shall be dismissed without further order;

…

(5) In the event of a dismissal under paragraph (2) or (4) a party may apply for the claim or response, or part of it, which was dismissed to be reinstated and the Tribunal may order a reinstatement. A reinstatement shall be effective only if the Tribunal fee is paid, or a remission application is presented and accepted, by the date specified in the order."

22. Rule 40(5) does not set out any test by reference to which an Employment Judge may order reinstatement. However, Rule 2 provides that an Employment Tribunal should seek to give effect to the overriding objective in exercising any power given to it by the **Rules**. Rule 2 provides as follows:

"2. *Overriding objective*

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

23. As to the giving of reasons Rule 62 of the **Employment Tribunal Rules**, so far as applicable, provides as follows:

"62. *Reasons*

(1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs).

(2) In the case of a decision given in writing the reasons shall also be given in writing. In the case of a decision announced at a hearing the reasons may be given orally at the hearing or reserved to be given in writing later (which may, but need not, be as part of the written record of the decision). Written reasons shall be signed by the Employment Judge.

(3) Where reasons have been given orally, the Employment Judge shall announce that written reasons will not be provided unless they are asked for by any party at the hearing itself or by a written request presented by any party within 14 days of the sending of the written record of the decision. The written record of the decision shall repeat that information. If no such request is received, the Tribunal shall provide written reasons only if requested to do so by the Employment Appeal Tribunal or a court.

(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short.

(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated."

Discussion and Conclusions

24. As I have said Rule 40(5) does not set out any criterion by reference to which an Employment Tribunal may order reinstatement. The criterion is, in my judgment, supplied by Rule 2(2) and by the overriding objective, which is to deal with a case justly and fairly. The specific considerations listed in Rule 2 are tailored more to case management issues than to the question of reinstatement after failure to pay a fee or submit an application for remission. But they contain important references to proportionality and the avoidance of delay.

25. Rule 40(5) is a specific form of relief from sanction. The sanction is not imposed to ensure good case management or a fair hearing, as is generally the case. Rather, it is imposed to ensure that litigants, usually Claimants, meet their statutory obligations to pay fees. Nevertheless I consider that some guidance can be obtained from cases concerned with relief from sanction in Employment Tribunal proceedings.

26. In **Neary v Governing Body of St Albans Girls School** [2010] ICR 473 an Employment Judge had disposed of an application for relief against sanction in a few crisp sentences. The Court of Appeal upheld his decision while saying that it would have been

sensible for the Employment Judge to have acceded to the request for further Written Reasons. The Court of Appeal, in particular, rejected the argument that a checklist then to be found in Rule 3.9 of the **Civil Procedure Rules** ("CPR") had to serve as the basis of the Employment Judge's reasoning. Janet Smith LJ said:

> **"52. I do not consider that the same detailed requirements are to be expected of an employment judge considering an application for a review of a sanction. Of course, the judge must consider all the relevant factors and must avoid considering any irrelevant ones. He might well find the list in CPR r 3.9(1) to be a helpful checklist, although he would be well advised to remember that, in the instant case, that list might not cover everything relevant. But he is not under any duty expressly to set out his views on every one of those factors. His decision must comply with the basic requirements as set out in *English v Emery Reimbold & Strick* [2002] 1 WLR 2409. Litigants are entitled to know why they have won or lost and appellate courts must be able to see whether or not the judge has erred. In a case of this kind, it seems to me that the basic requirements are that the judge must make clear the facts that he has regarded as relevant. He must say enough for the reason for his decision to be understood by a person who knows the background. In a case where the draconian sanction of strike-out has been imposed, it will be necessary for the judge to demonstrate that he has weighed the factors affecting proportionality and reached a tenable decision about it. That does not mean that he must use any particular form of words. Any requirement for a particular form of words leads readily to the adoption of them as a mantra. But it must be possible to see that the judge has asked himself whether in the circumstances the sanction had been just."**

27. In **Thind v Salvesen Logistics** UKEAT/0487/09/DA Underhill J at paragraph 13 summarised the position as follows:

> **"13. The Claimant's original Notice of Appeal, and a subsequent amended version lodged once the Tribunal's Reasons had been received, relied to a considerable extent on the line of authorities which begins with the decision of this Tribunal in *Maresca v Motor Insurance Repair Research Centre* [2005] ICR 197: these hold that a tribunal considering an application for relief following the activation of an unless order must have regard to the provisions of rule 3.9 of the Civil Procedure Rules. Those grounds have now been undercut by the recent decision of the Court of Appeal in *Governing Body of St Albans Girls' School v Neary* [2009] EWCA Civ 1190, which has over-ruled *Maresca* and the cases which followed it and has made it clear that there is no obligation in law on an employment tribunal to proceed by reference to CPR 3.9.**

28. In my judgment this general approach is helpful. It indicates factors which an Employment Judge should take into account. I would, however make one observation. It is important not to treat a Tribunal's warning letter under Rule 40 as equivalent to an unless order. An unless order follows breach of an existing order of the Employment Tribunal. Failure to comply with an unless order therefore generally involves a failure to comply with two specific Tribunal orders. These are matters of considerable weight in any balancing exercise. In a case

under Rule 40 there may be no breach of any existing order. The deadlines given, both in a notice to pay and in a Rule 40 warning letter, are short. While the Rule 40 letter is a trigger to the operation of dismissal under Rule 40, failure to comply with it does not carry the same degree of weight as failure to comply with an unless order.

29. The approach of an appellate court is also established by **Neary**. Janet Smith LJ said:

> **"49. It is often said that decisions of this kind are discretionary. It seems to me that a decision such as this is not so much an exercise of discretion as an exercise of judgment. But this may be a distinction without a difference in that, in both cases, there is a duty on the judge to decide the case rationally and not capriciously and to make his decision in accordance with the purpose of the relevant legislation, taking all relevant factors or circumstances into account. He must also avoid taking irrelevant factors into account. In both cases there may be two correct answers or at least two answers which are not so incorrect that they can be impugned on appeal. Whereas with the exercise of discretion, the question will be whether the judge's decision was permissible on the evidence, with an exercise of judgment the question will be whether his decision was fair. But provided that the judge has met these requirements, his judgment should not be impugned merely because the appellate court would or might have reached a different conclusion."**

30. Applying these principles, I have reached the conclusion that the Employment Judge's Reasons, short though they are, meet the requirements of the law and are free from perversity or any legal error.

31. In the first place, there is no doubt that the Employment Judge did, in the words of Janet Smith LJ, ask herself whether the imposition of the sanction was just. She expressly stated that it would not be in the interest of justice to reinstate the claim. Accordingly she demonstrated that she had the correct legal test in mind.

32. Secondly, it is important to keep in mind that the grounds put forward in support of the application for reinstatement were extremely brief. I have quoted them already. To my mind the Employment Judge dealt with them. She did not accept that the Claimant's representative was in hospital or otherwise unable to deal with the matter. She was fully entitled to reach this

conclusion. Indeed it seems plain today, having regard to material which I have seen in support of the application to adduce further evidence, that the Claimant's representative was not in hospital at any material time. The Employment Judge gave her essential reasons for reaching the conclusion she did, noting that the Claimant's representative had corresponded with the Employment Tribunal and with the Respondent. She might have elaborated on that conclusion. For example, she might have set out something of the nature of the correspondence and she might have added that the Claimant's representative had never mentioned any illness of his own. However, this elaboration was not essential. To my mind she addressed the key point which had been made in support of the Claimant's application and gave reasons why she did not accept it.

33. The Employment Judge also made the point that the Claimant's representative had not actively pursued the case. It is clear what she meant. By the time of her decision the deadline for service of a witness statement on the Claimant's behalf had passed, and no statement had been served despite an extension of time. The Claimant must have been well aware that she had served no witness statement. This did not need to be spelled out in the reasons.

34. Today it is said that the Claimant's representative was effectively housebound and unable to go to his office to collect correspondence. The Employment Judge cannot be faulted for failing to deal with this point. It was not made to her.

35. It would, I think, have been better if the Employment Judge had spelled out more fully why it was not in the interests of justice to grant the application just as it would have been good practice if the reasons had been fuller in the case of **Neary**. But to my mind the essentials are there. The Employment Judge considered where the interests of justice lay and addressed the

specific grounds on which the application for reinstatement was made. To my mind the reasons are sufficient and the conclusion cannot possibly be described as perverse.

36. I turn, then, to the application to adduce fresh evidence. I refuse it for the following reasons. Firstly, once granted that there is no error of law in the Employment Judge's Reasons, the application is effectively a freestanding application unrelated to any question of law. The Employment Appeal Tribunal is vested only with jurisdiction to address questions of law. Any freestanding application to adduce further evidence ought to be made to the Employment Tribunal. Indeed, albeit out of time, such an application was made to the Employment Tribunal in this case.

37. Secondly, I am unconvinced that the material could not have been available with reasonable diligence when the application for reinstatement was made. According to Mr Khanna's witness statement, it was he who set in motion the application. I see no reason why he should not have been able to make the central point, if it was correct, that he never saw the notices because he did not attend his office. Indeed, I see no reason why he should not have given a statement at the time. Mr Khanna has now given a statement - and he is still, according to certificates provided with that statement, unfit for work. On the material I have I remain unconvinced that his statement could not, with reasonable diligence, have been provided before the application was made.

38. I would also say that I am by no means satisfied that his statement would have made any important difference to the decision. Although he says that he was unable to attend his office, all that was required for the fee application to be dealt with was an email to his client and possibly an arrangement for someone at his office to forward the relevant letter. Anyone versed

in Employment Tribunal proceedings would have known that the fee notice had arrived with the Notice of Hearing and the Respondent's email had alerted Mr Khanna to the position.

39. Accordingly, while I reject the application to adduce fresh evidence on the basis that it is inappropriate as a freestanding application before Employment Appeal Tribunal, I would in any event have rejected it, applying **Ladd v Marshall** criteria.

40. Finally, I should deal with Mr Lloyd-Eley's application for leave to amend the Notice of Appeal to appeal against the later reconsideration decision. This was the logic of the way Mr Lloyd-Eley was putting his case in reply, and I drew out the application for permission to amend from him. In truth, however, it is bound to fail. Firstly, it is made far too late in terms of the hearing of this appeal. It would effectively require an adjournment and a further opportunity for the parties to make submissions. The overriding objective applicable to the Employment Appeal Tribunal points very strongly against it. Secondly, quite apart from any question of lateness, it is the general practice of the Employment Appeal Tribunal to require a fresh Notice of Appeal against a reconsideration decision. I see no reason why that practice should not be adopted in this case.

41. For those reasons the appeal will be dismissed and the oral application for leave to amend will also be dismissed.