Appeal No. UKEATPA/1215/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 June 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MINISTRY OF JUSTICE — APPELLANT

(1) MRS F BURTON
(2) MR A ENGEL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEALS FROM REGISTRAR'S ORDERS

APPEARANCES

For the Appellant	MR CHARLES BOURNE QC (of Counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS
For the First Respondent	MR SAUL MARGO (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St Johns Lane London EC1M 4LB
For the Second Respondent	MR ANTHONY ENGEL (The Second Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

Two fee-paid Judges of what is now the Residential Property Tribunal appealed against the grant by the Registrar of the Employment Appeal Tribunal of an extension of time to the Ministry of Justice to appeal against decisions of the Employment Tribunal. The Notice of Appeal was filed just after the deadline for submission of such a Notice had expired. There was no acceptable reason for this, but in common with the Registrar the President allowed the extension so that issues of some constitutional significance, which were important to a number of Judges, and which had been subject to the test case procedures could be determined: the claims and appeals were exceptional, and there would be serious complications for other cases governed by the test case procedures if an appeal could not be heard.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against an order made on 25 February 2015 by the then Registrar of the EAT, who exercised her discretion to extend time to the unsuccessful Respondent, the Ministry of Justice, to file an appeal against a decision in ongoing litigation between a number of former and present Judges and the Ministry of Justice.

2. The decision in question was made on 13 November by Employment Judge Macmillan at London (Central). He held that the Claimants were less favourably treated than their full-time comparators. The Claimants before him were two lead Claimants, Mr Engel who brings this appeal and Mrs Burton. They had both been fee-paid part-time Chairmen of the Residential Property Tribunal Service, now the First-tier Tribunal Residential Property Tribunal. Their claim for parity arose in consequence of the decision in **O'Brien v Ministry of Justice** [2013] UKSC 6, which recognised that a part-time fee-paid Judge could claim parity of terms (in that case in particular in respect of pension but also other terms) with those enjoyed by full-time salaried Judges. Significantly for present purposes they were lead Claimants.

3. The **Employment Tribunals Act 1996** provides by section 30(2)(a) for Appeal Tribunal procedure Rules to include provisions with respect to the manner in which, and the time within which, an appeal may be brought. The statute also provides, by section 29A, for the making of practice directions in respect of procedure before the Appeal Tribunal.

4. Made under the powers then granted in the **Employment Appeal Tribunal Rules 1993**, Rule 3(3) provides for a period of 42 days from the date on which the Written Reasons were sent to the parties within which an appeal must be made. That is supplemented by the **Practice**

Direction made most recently in 2013, which at paragraph 5 contains nine subparagraphs concerning the time for appealing. This largely repeats earlier directions, and employment practitioners are expected to be fully familiar with it, as well as with the guidance which is currently available on the website. That makes it clear that the working day for the Appeal Tribunal finishes at 4pm. Any correspondence or Notice of Appeal delivered after that time or in part after that time is regarded as received on the day following.

5. However, although Rule 3(3) does not within its own terms make any reference to an indulgence in respect of time, Rule 37 of the **Employment Appeal Tribunal Rules** does so. It provides, under subsection (1):

> **"The time prescribed by these Rules or by order of the Appeal Tribunal for doing any act may be extended (whether it has already expired or not) or abridged …"**

The exercise of that power is nowadays subject to the overriding objective set out at Rule 2A. That requires a Tribunal to deal with a case justly, which includes the matters referred to at 2A(2). They include:

> **"…**
>
> **(b) dealing with the case in ways which are proportionate to the importance and complexity of the issues;**
>
> **(c) ensuring that it is dealt with expeditiously and fairly; and**
>
> **(d) saving expense."**

6. An appeal from a decision of the Registrar on an interlocutory matter for which provision is made within the **Rules** is by way of a complete re-hearing. The Ministry of Justice has asked for an extension of time because in this particular case the Notice of Appeal was not filed until 29 December. It had been due originally on 25 December, but that being Christmas Day followed by Boxing Day, a public holiday followed by the weekend, the last day became 29 December, a Monday. It was not until 4.09 that the Notice of Appeal began to be served and

not until 4.11 that was completed. It was therefore out of time. It has been well recognised in cases decided now more than ten years ago that, even if the transmission electronically of a Notice of Appeal to the EAT begins before 4pm, if it finishes after the appeal is out of time, an extension of time usually will be refused. That is the exercise of a discretion which is regarded by the Court of Appeal as unforgiving, though it does permit of exceptions.

7. The principles upon which an application for extension of time should be granted were seminally expressed in the decision of Mummery J as President in **United Arab Emirates v Abdelghafar** [1995] ICR 65, one of the Familiar Cases of the EAT, at Number 20. That case has been considered a number of times since by the Court of Appeal, is frequently quoted, and has been endorsed and approved. It has become the starting point for most discussions before this Tribunal when questions of extension of time are considered.

8. At page 69 of the report Mummery J discussed the exercise of the discretion which Rule 37 permitted. In doing so, he noted (page 70 between B and C):

> **"… The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the appeal tribunal. The result of an exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses."**

He went on to observe that an extension of time was an indulgence requested from the court by a party in default. That party is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one:

> **"… His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default." (Page 70H)**

He went on to observe (page 71 between G and H, beginning at paragraph 3), that if an explanation for the delay were offered:

> **"… other factors may come into play in the exercise of the discretion. It is, of course, impossible to make an exhaustive list of factors. The appeal tribunal will be astute to detect any evidence of procedural abuse, questionable tactics or intentional default. The tribunal will look at the length of the delay which has occurred, though it may refuse to grant an extension even where the delay is very short. Extensions have been refused, even where the notice of appeal was served only one day out of time. Parties who have decided to appeal are also strongly advised not to leave service of the notice of appeal until the last few days of the 42-day period. If they do, they run the risk of delay … That risk can be avoided by service of the notice of appeal well within the period. The merits of the appeal may be relevant, but are usually of little weight. It is not appropriate on an application for leave to extend time for the appeal tribunal to be asked to investigate in detail the strength of the appeal. Otherwise there is a danger that an application for leave will be turned into a mini-hearing of the substantive appeal. Lack of prejudice or of injustice to the successful party in the original proceedings is also a factor of little or no significance. If there is irreparable concrete prejudice, that will strengthen the opposition to the application for extension; but, even if there is no prejudice, the application may still be refused."**

The Background

9. The focus of most cases is thus inevitably upon the reasons for the delay. In the present case those reasons were expressed in a letter from the Treasury Solicitor's department, signed by Dalbir Singh, who had conduct of the matter, which over three pages of close type set out the history of the matter. Though Mr Engel does not regard the explanation as acceptable, he does not suggest that it is dishonest. Indeed he goes so far as frankly to accept the honesty of the explanation. It is open to the applicant for an extension of time to call evidence. Mr Bourne QC, on behalf of the Ministry, has not done so. Accordingly, if there were any matter which evidence might touch upon, though the honesty of the matters recorded in the letter of 29 January is not in question, given the stance of Mr Engel, I will take that against the Ministry. Mr Engel tells me he would wish to ask some questions. In particular, what concerns him is why it was that the Ministry waited so long before taking action. What the Ministry said through Treasury Solicitors was to make reference to the nature of the litigation.

10. It is notorious in legal circles that "**O'Brien**" claims, a generic description of a class into which this claim falls, raise a large number of issues of some complexity and of some

constitutional importance. The Treasury Solicitor refers to it as exceptionally demanding litigation. There is an element of hubris about that, but I have no doubt that it is important and demanding. He noted that after the adverse Judgment, as the Ministry saw it, of 13 November the Ministry applied to the Tribunal for reconsideration of a number of the issues. Mr Engel observes with some force that it could equally have submitted a Notice of Appeal since it would cover much the same ground in effect. It, however, was not until 22 December that counsel settled a draft Notice of Appeal. That draft was not shown to solicitors and approved by the Ministry of Justice until just after midday on 29 December. That was the last day. In my view it was leaving it very late. It took the risk, in particular, over the Christmas period that other matters might interfere with the chances of it being submitted in time.

11. Final comments in a final draft were not in fact complete until 3.01, which left less than one hour to lodge the appeal. This was, in my view, brinkmanship. The deadline was missed because the lawyer at Treasury Solicitors dealing with the matter was under the misapprehension that the deadline was 4.30 not 4.00. Mr Bourne is clear that this view was an aberrant one and he does not seek to excuse it. But the effect was that the individual, rather than submitting the appeal there and then, responded to a request to attend a brief meeting to deal with other matters in the judicial pension litigation, which meant that he did not deal with filing the appeal until just after 4.00.

12. I do not regard that as an acceptable explanation for the delay. I do regard it as honest. Although the letter does not deal with matters leading up to counsel's draft on 22 December, I regard it as sufficiently full for my current purposes.

13. Returning to the submissions, Mr Bourne argues that for a combination of reasons, despite what might in most cases have been the consequence of this history, I should grant an extension of time. He submits the delay was very short. It was just a matter of a few minutes. It was a fleeting mistake by a legal advisor, whom he asked me to accept was under pressure. That was complicated by the fact that the deadline had expired in the holiday period. He adds that the Claimants are lead Claimants and there is a public interest in the subject matter. He argues that the litigation related to **O'Brien** claims involves what are described in the skeleton as thousands of claims, relentless deadlines and constant pressure from Claimants impatient for a remedy. The suggestion that the Ministry of Justice could devote a larger team to managing this litigation is unrealistic in the context of public sector cuts in available resources. He prays in aid the reference in the case of **Muschett v HM Prison Services** [2009] ICR 424, a decision of HHJ McMullen in this Tribunal, which drew together the then available learning on the extension of time in respect of four appeals against Registrar's orders by disappointed Claimants, in one of which he did extend time. He observed (Familiar Cases Number 23) that there was a desirability in some cases of not visiting a lawyer's mistake on a client and he points out that in this case the client is the public. I should say immediately that at the start of his submissions he accepted that the principle should be that the fact that the Respondent to the claim is the Ministry of Justice, a public body, does not entitle it to be treated any better than any other litigant, though of course it must be treated no worse when it comes to the application of law. To that extent I have some hesitation in regarding the fact that the client might be the public as having any real relevance to my decision.

14. He does not argue that it was impossible to file the appeal earlier within the 42-day period. But, as the court noted in **Muschett**, the test is not whether it is "not reasonably practicable", as it would be in a case where the time limits in unfair dismissal claims came for

consideration. The fact that the appeal could have been filed earlier is a relevant factor but not decisive. He is right in that, but he might also have observed that matters should not be left to the last minute.

15. He does, however, say in respect of the fourth of the points he generally made, that of the nature of the case, a lead case of public interest, that this was of particular importance. He argues that the Claimants are lead Claimants whose case decides issues important to the judiciary, who claim to have suffered discrimination. The overriding objective, he submits, very strongly favours genuine issues being decided.

16. Mr Engel resists the application for an extension. He argues there is nothing exceptional in this case which would justify the generous time limit being extended. Indeed the Ministry of Justice, of all people, he submits, should be particularly aware of a time limit which is one which originally it had played a part in setting. He argues that he has suffered prejudice which, given the comments of Mummery J, he is entitled to pray in his aid. This is not prejudice to the disappointed loser in the claim. It is prejudice to him as a potential Respondent to the appeal. He is 72. He has in the past suffered recent and serious illness which might limit his life expectancy. This litigation for him began now in 2011, and although he has succeeded in part, he has received no compensation from the Ministry in respect of his service in the Residential Property Tribunal. He argues that, if I am to give an extension of time, it should be on particular terms as to the making of an interim payment in respect of those matters which he has already succeeded upon.

17. The prejudice he has suffered by the combination of delay and persistent non-payment, as he sees it, comes within the description “irreparable concrete prejudice”, which Mummery J

used. He argues that the merits of the appeal are relevant. In general the legal position is that the merits are not, as Mummery J himself observed. But, where it can be said that an appeal truly has no hope, then I accept that may be taken into account. He urges that, in conformity with the approach which this Tribunal takes to other appeals, I should dismiss the application for an extension of time.

Discussion

18. The discretion which I have must be exercised judicially. That is not only in accordance with reason, relevance and logic so as to produce justice but in a manner which, as between litigants in broadly the same position, is consistent. It is particularly important in a Tribunal such as this that time is not extended in one case when it would be refused in another or vice versa. This is in part why it is recognised that cases in which time is extended will of their nature be exceptional. That is not to say that being exceptional is a necessary criterion, merely to make an observation about those cases in which time is extended.

19. As it happens, the cases which set out the law in respect of the extension of time, which are contained in the Familiar Authorities bundle before the EAT, contain though four in number three instances of cases in which there was actually such an extension. **United Arab Emirates** itself was one. That was a case in which Mummery J said, page 72G, that if the explanation for the delay was the only material relevant to the exercise of a discretion in that case, he would have dismissed the appeal from the order refusing to extend time. It did not excuse the delay. He permitted the case to proceed because it was an exceptional feature that it related to state immunity. In the case of **Jurkowska v HLMAD Ltd** [2008] ICR 841 CA it was likewise recognised that there could be cases, of which **Abdelghafar** was one, where time would be extended even if there were no good excuse for the delay (see paragraph 17 in the Judgment of

Rimer LJ and his recognition in paragraph 18 that dealing with a case justly required all the circumstances of the case to be considered). In that case an exercise of discretion in favour of extension by the Registrar and by Underhill J was in the event upheld.

20. In **Muschett**, as I have already noted, one of the four cases was permitted to proceed, that having remarkable features in respect of the particular skills of one of the applicants.

21. In a jurisdiction which requires all the relevant circumstances to be considered, it is impossible to be fully prescriptive in advance of those which might fall on one side of the line or the other. No two cases, if they are exceptional, will have exactly the same features. As in the case of Mummery J and **Abdelghafar**, I have concluded that I have not had an acceptable or good reason for the delay. I am, like him, nonetheless persuaded that in the circumstances of this particular case, which are in my view so unusual as to be within a class of "exceptional", if that were necessary, time should be extended.

22. I do that because of the particular nature of the case. The consequences of the case apply not simply, as they do in most cases, between two private litigants. They apply to a cohort of Judges. There are two relevant cohorts in this particular case, though I suspect the impact is wider than that still. There are the number of Claimants of whom Mr Engel and Mrs Burton are the leads. I am told there are some 35 in number. The total number of Judges immediately affected by the decision is 138. Plainly what applies to the 35 will in litigation such as this apply to the 138. But they too have to be seen within a context which includes other Judges in similar situations. Decisions have to be consistent and coherent as between them, a reason why one Judge, Employment Judge Macmillan, has the task of hearing all the claims in the **O'Brien** genus which have come before the Tribunal.

23. The particular position of lead Claimants is one which Mr Engel submits, with perhaps some reason, to be problematic. It is plain he does not himself consider that the application of the lead Claimant provisions has been happy. The rule of the Employment Tribunal, under the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** at Rule 36, provides in the case of lead cases that when the Tribunal makes a decision in respect of the common or related issues which lead to the case being identified as such:

> **"(2) … it shall send a copy of that decision to each party in each of the related cases and, subject to paragraph (3), that decision shall be binding on each of those parties."**

24. It follows that, on any issue which arose in Mr Engel's case in common with Mrs Burton and in common with other litigants in the cohort, each would be bound by the decision. Public administration is such that that would require that all the other Judges subject to the decision were treated in a consistent and coherent manner too.

25. The immediate facts of Mrs Burton's claim demonstrate some of the difficult effects that can follow. It is necessary within the rules for an appeal against a Registrar's order to be made within five days. Though her order was made in respect of both the cases of Engel and Burton, upon the application of the Ministry for extension, Mr Engel submitted his appeal against her order within time but she did not. Mr Margo, who appears today though something of a silent presence in most of the hearing, because I heard the Engel appeal first, would have had a difficult task to persuade me, upon the usual approach in individual cases, that time should be extended to permit his client to appeal her decision too. It is likely, because of the realistic stance which the Ministry of Justice has taken in this litigation, that what applied to Mr Engel would apply to her too. But the theory demonstrates the particular difficulty of dealing with lead cases. In theory it would be possible for the decision in one lead case to be granted, as it were, immunity from appeal because the appeal was too late, but in the other the appeal

could continue. The effects upon the two different lead cases would therefore potentially be different and the conclusion for others more difficult and complex to unravel. In this case that does not arise because of the realistic approach taken by the Ministry. But it demonstrates clearly that this is litigation which is in reality between a class of litigants and their Respondent and is of major importance to all.

26. In this context the delay is short, exceptionally so, and although that would not normally entitle an extension of time on its own, it is on the inter-relationship of that and the other factors which he prays in aid that Mr Bourne's application rests.

27. In the event I have decided that the particular objections which Mr Engel brings are to a large extent based upon the prejudice he feels he will suffer individually by reason of the extension of time which has occurred and his lack of available funds in the meantime. The prejudice caused by time can never be fully remedied but because the parties are here, it seems to me that if, as I do, I grant an extension of time, they should consult before they leave the court with the List Officer at this Tribunal. The current status of both this and an appeal which has been filed within time in respect of reconsideration is that they have yet to be sifted. But I see no objection in principle to a putative date being set at which the appeal will be heard if the appeals pass the sift. That should at least enable time to be shortened to the greatest extent possible and to that extent alleviate some of the prejudice to which Mr Engel has referred.

28. Secondly, and consistent with the principle that he who applies for an indulgence does so on mercy, Mr Bourne has offered to pay a contribution to Mr Engel's costs in the sum of £2,500, thereby meeting some of the economic prejudice of which he complains. This is a contribution to his costs. It is an offer made on instructions and it is one which, although an

extension of time cannot be bought, it is one which this court recognises as appropriate and endorses and it would be therefore, on his offer, a condition of the extension that that sum be paid.

29. The mention of reconsideration turns me to the last matter which I have in mind as persuading me that this is a case in which it is proper to exercise my discretion. That is the overriding objective. To deal with this appeal in ways which are proportionate to the importance and complexity of the issues argues in this particular case, because of its unusual nature and its consequences, that I should extend time. It is just that that should be so because otherwise there would be the anomaly of an appeal against a reconsideration of a decision when an appeal against the decision itself would be precluded, an undesirable situation but one I am entitled to take into account. And it seems to me that taking the decision I do should ultimately save expense because it will mean that both matters can be heard and determined together at the same time. It is more likely than not to reduce the possibility of further appeal, though in this class of case I simply cannot say with any confidence that that will be eliminated.

30. For those reasons it seems to me that the objections which Mr Engel has can to some extent, though I do not suggest fully, be accommodated. I decline to make the order he makes that there be an interim payment, though I recognise his interest in making that request. If he wishes that, it will have to be pursued on carefully developed grounds elsewhere or else it will be a matter where he has to abide by the ultimate result of this litigation. As to that, I have done what I can to make it sooner rather than later.

31. For those reasons I dismiss the appeal in the case of Engel.

32. I turn separately to the case of Burton. Mrs Burton recognises, through Mr Margo of counsel, that if the appeal is dismissed then there is no proper ground that he can advance in favour of his client's wish to appeal. There will in her case be no question of costs either way and therefore I dismiss her application for an extension of time too.

33. The matters of the costs up to Registrar level have been agreed elsewhere.