Appeal No. UKEAT/0296/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 January 2015
Judgment handed down on 6 May 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MISS B HIGGINS — APPELLANT

(1) HOME OFFICE
(2) ATTORNEY GENERAL — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW ALLEN (of Counsel) Bar Pro Bono Scheme
For the Respondents	MISS CLAIRE DARWIN (of Counsel) Instructed by: Treasury Solicitor's Department One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE

Striking-out/dismissal

Bias, misconduct and procedural irregularity

The Claimant, who had a long history of mental illness, issued her claim for unfair constructive dismissal (some six years from the date her employment ended). The grounds of claim were poorly drafted but it was possible to spell out claims of unfair dismissal and for compensation. The ET1 did, however, contain an inadmissible claim for compensation for loss suffered by the Claimant's mother. The Claimant was sent a letter of rejection of the claim, pursuant to the Employment Tribunal Rule 12 which requires an Employment Judge in appropriate circumstances to reject a claim form if it is one that the Employment Tribunal has no jurisdiction to consider, or is in a form that cannot sensibly be responded to, or is otherwise an abuse of the process. The Employment Judge rejected the claim on the grounds that it was an abuse of process; the reasons given were that the claim was:

(i) brought outside of time limits,

(ii) the remedies sought did not appear to be those the Tribunal can award,

(iii) the Claimant did not appear to be claiming unfair dismissal.

The Employment Appeal Tribunal considered that the Employment Judge was wrong in relation to grounds (ii) and (iii).

Insofar as ground (i) was concerned, an ET1 issued out of time is not necessarily an abuse of process, as the Employment Tribunal has jurisdiction to extend time in cases of unfair dismissal if satisfied it was not reasonably practicable to lodge the claim in time.

There was sufficient material to put the Employment Tribunal on notice that the Claimant, by reason of her mental health, may have been unable to present her claim at an earlier date. Had enquiries been made, the Employment Judge would have learned that a consultant psychiatrist considered that for the last six years the Claimant had not been well enough to pursue a legal case.

A decision under Rule 12 should be reserved for plain and obvious cases and the Employment Judge should also have had regard to the Claimant's disability. In cases where there may be an element of doubt, the Employment Tribunal should proceed by way of Rule 27 which permits a Claimant to make representation before the claim is dismissed for lack of jurisdiction or because it has no reasonable prospect of success.

HIS HONOUR JUDGE SEROTA QC

1. This is an appeal by the Claimant from the rejection of her ET1 by Employment Judge Sage, sitting in Croydon. The notice of rejection is dated 10 March 2014. The Claimant was a litigant in person in the proceedings before the Employment Tribunal but has had the good fortune to be represented in the Employment Appeal Tribunal by Mr Andrew Allen of the Bar Pro Bono Unit. The Employment Appeal Tribunal is always grateful to members of the Bar, and others such as Mr Allen, who take time off from their busy practices to assist unrepresented parties. In the instant case Mr Allen persuaded me to make an order other than that I would otherwise have made, and I again express my gratitude to him.

The Factual Background

2. The Claimant was employed by the Respondent, now the UK Visas and Immigration, as an Immigration Officer, from 2003 until 23 December 2007. I refer to the case put forward by the Claimant and observe that it is controversial and not accepted by the Respondent. During the course of her employment she maintains that she applied for a position with MI5; this is not accepted by the Respondent. It is clear that she suffered from mental health issues during the course of her employment and on one occasion resigned but was permitted by the Respondent to withdraw her resignation, apparently influenced by the Claimant's health issues. The Claimant then resigned again on 26 or 27 November 2007 on notice expiring 23 December 2007. She again sought to withdraw her resignation but on this occasion she was not permitted to do so. She seeks to say that her resignation was in effect a constructive dismissal.

3. On 28 October 2007 she was admitted to Herdmanflat Hospital (which I take to be either a psychiatric hospital or a hospital with a psychiatric unit) where she remained for several days,

suffering from an acute psychotic illness. There is in the bundle a letter from a consultant psychiatrist, Dr T D Rogers, of the East Lothian Community Health Partnership Community Adult Mental Health Team. The letter is dated 26 March 2014 and states:

> **"… I can certainly confirm that during the past six years you have not been well enough to pursue a legal case and therefore this needs to be taken into account when the "time bar" is considered."**

4. It is apparent from documents submitted by the Claimant that she maintains that her mental health was affected by a somewhat strange series of communications from a Mr Jones, which led the Claimant to believe that, following her application to work for MI5 (which is not accepted by the Respondent), which had apparently been rejected, personal information about her, and possibly about those around her, was being disseminated. It is not known who Mr Jones is or why Mr Jones knew anything of her employment details and let her believe that she was going to be moved to another post. She complained of harassment and of being denied a move to another department outside the district where she worked.

5. In early 2008 she instructed solicitors, who wrote a letter on her behalf, but she maintains she was then too unwell to commence proceedings. The three-month time limit for the commencement of proceedings for unfair dismissal expired, so it is said, on 22 February 2008. Her ET1 was in fact lodged on 27 January 2014, almost six years out of time. I refer to the ET1, in which box number 4, asking the Claimant to identify the claim she was making, has inserted the words "constructive dismissal".

6. At box number 8, in answer to the instruction 8.1, "Please indicate the type of claim you are making by ticking one or more of the boxes below", she has ticked the box marked "I was unfairly dismissed (including constructive dismissal)". She goes on to refer to a concern she had about an instruction not to fingerprint illegal entrants on removal cases, thereby allowing

illegal entrants to enter multiple times by giving different names and be counted as separate removals. This led to her first resignation, which was subsequently withdrawn. She complained of harassment, being off sick with reactive depression and being victimised after raising concerns about her tandem line manager's comments to her. She was advised that she would return to the same place of work where the harassment took place, but she became upset and anxious, and as no remedial action was taken, she felt obliged to go home. She was denied a move to another department. She had also been denied career breaks, and she describes the interventions by Mr Jones from "across the street from my home". She claims that she was:

> **"… made aware that Mr Jones had access to significant data on me covering a period of five months and future details. I was offered information which compromised my safety and mental health. …"**

She believed that she was about to be moved to MI5's offices at Thames House. This affected her mental health. After her return to work, following the withdrawal of her first resignation, she appears to have been dissatisfied with the care offered to her. She then went on to say:

> **"I was sent a referral for Occupational Health by email under work related stress but predominantly the referral asked on the form for a prognosis on alcoholism, I did not sign it as it was incorrect. I was unclear whether Occupational Health was where I should speak about this incident at first. It was overwhelming in content I could not condone for [sic] any job at Thames House. …**
>
> **I resigned on the 23rd November 2007 to inform senior management the exact reason for my hospitalisation, being informed by a third party [Mr Jones?] a move was being arranged for me …"**

There were also concerns about her mother and sister having contacted the Respondent.

7. As I have noted the ET1 is somewhat muddled, but bearing in mind that a constructive dismissal can occur by reason of the cumulative effect of a number of matters, the last one of which need not in itself be a breach of contract, it is possible that a claim for constructive dismissal could be made out; see **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35 CA.

8. The claim is somewhat unstructured, but one can just about make out a case for constructive dismissal. The ET1 answered the question (9.1) "what you want if your claim is successful", and she ticked the box:

> **"If claiming unfair dismissal, to get another job with the same employer or associated employer and compensation (re-engagement)"**

9. She also includes a claim that she had made a protected disclosure by ticking box number 10. In her ET1 the Claimant also added this:

> **"I would like my mother to be compensated as she had to help me both with housing and financially and she was mentioned by Mr Jones. …"**

She added later:

> **"I can't put a figure in monetary terms for compensation as yet as the detriment to me was and is fairly complex as it affected every part of my life."**

10. The letter of 10 March 2014 (a notice of rejection) failed to refer to the Claimant by name so it was re-sent on 12 March 2014. I shall return to this notice after I have set out the relevant **Employment Tribunals Rules of Procedure**, which will inform consideration of the balance of this Judgment.

11. Rule 12 of the **Employment Tribunals Rules of Procedure 2013** provides as follows:

> **"12.** ***Rejection: substantive defects***
>
> **(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be -**
>
> > **(a) one which the Tribunal has no jurisdiction to consider; …**
> >
> > **(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;**
> >
> > **…**
>
> **(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) or paragraph (1).**
>
> **(2A) The claim, or part of it, <u>shall be rejected</u> if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) …" (my underlining)**

12. Rule 13 entitles a Claimant to seek reconsideration of the rejection of the claim and the Claimant might request a hearing. Rule 26 provides for initial consideration of the claim form and response by an Employment Judge, and Rule 27 provides as follows:

> **"27. *Dismissal of claim (or part)***
>
> **(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties -**
>
> > **(a) setting out the Judge's view and the reasons for it; and**
> >
> > **(b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.**
>
> **(2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).**
>
> **(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. …"**

Rule 37 provides as follows:

> **"37. *Striking out***
>
> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -**
>
> > **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
> >
> > **(b) that the matter in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
> >
> > **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
> >
> > **(d) that it has not been actively pursued;**
> >
> > **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**
>
> **(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**
>
> **(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."**

13. The claim was rejected by a letter dated 10 March 2014. In fact, I understand that the letter of 10 March 2014 named incorrect and unrelated parties in a case called **Clarke v Abellio**

London. This letter included a document entitled "Claim rejection – your questions answered. Document 1:11". The officer at the Tribunal Service in Croydon realised the error and corrected and posted the letter referring to Miss Higgins against the Immigration and Nationality Directorate but also dated it 10 March 2014. It was posted with an apology letter on 12 March 2014. The "Your questions answered" document does not appear to have been attached. I do not know, therefore, whether the Claimant did in fact receive the document. The letter is in very short form:

> **"Your claim form has been referred to Employment Judge Sage who had decided to reject it because it is an abuse of the tribunal's process.**
>
> **The Judge's reasons for this decision are as follows:**
>
> **The claim is brought outside of time limits; and the remedies sought do not appear to be those a tribunal can award; and the claimant does not appear to be claiming unfair dismissal.**
>
> **I enclose some explanatory notes called 'Claim Rejection - Your Questions Answered."**
>
> **"Q.** ***Why has my claim been rejected?***
>
> **A There are five reasons why your claim may have been rejected, namely:**
>
> - **it was not on a prescribed form**
> - **not all the minimum information has been provided**
> - **the rejected claim is not a claim the Tribunal can deal with**
> - **the claim is in a form that cannot sensibly be responded to**
> - **the claim is an abuse of the Tribunal's process**
>
> **The letter returning the claim form to you will explain why it has been rejected."**

14. Although the letter copy is somewhat unclear, the notice of rejection was issued under Rule 12(1)(b). I assume that the Claimant will have received the "Your questions answered" document because she did indeed apply for reconsideration on 17 April 2014. The application for reconsideration dated 17 April 2014 has attached to it the psychiatrist's letter of 26 March 2007 explaining why the claim was out of time. In the application for reconsideration the Claimant gave further details of her illness. The application for reconsideration was refused on

17 April 2014. Employment Judge Sage stated that she had conducted a reconsideration of the rejection but concluded that the decision to reject the ET1 was correct:

> **"… Although medical evidence has been produced showing that claimant was unwell and was hospitalised from 28 October 2007 to 1 November 2007, and was considered not well enough to pursue a legal case, it was noted that the claimant referred in her letter to pursue matters with the police."**

15. Also it is noteworthy that there is no specific reference to Dr Rogers' letter and his confirmation that "during the past six years you have not been well enough to pursue a legal case". There has been no appeal against the refusal of the application for reconsideration and, therefore, I say little more about it, other than the fact that the medical evidence is somewhat like the elephant in the room.

16. On 22 September 2014 the Notice of Appeal was referred to a Full Hearing by HHJ Richardson. He observed that it appeared that two of the reasons given by the Employment Judge were clearly wrong in that the Claimant had made a claim for unfair dismissal and also for an appropriate remedy. He also considered that it was arguably not necessarily an abuse to present a claim out of time, and that issue (arguably) might be best disposed of under Rule 27 which offered a Claimant the opportunity of a hearing. There seems to have been some initial confusion as to the proper parties to the appeal, and the Home Office and the Attorney General were substituted as Respondents.

Notice of Appeal

Ground 1

17. The Employment Judge was wrong to say that the remedies were outside the jurisdiction of the Employment Tribunal. While some remedies may have been, others were not, and the

Employment Judge was wrong and failed to appreciate there were claims for compensation and re-employment, to which I have already referred.

Ground 2

18. The Employment Judge was wrong to say there was no claim for unfair dismissal. The Claimant had ticked the boxes to show that she was making a claim for unfair dismissal (constructive dismissal) and had ticked the appropriate box relating to remedy. The narrative does make out, as I have already noted, a somewhat unstructured or muddled claim that might support a case of constructive unfair dismissal. I was reminded of the principle of the cumulative effect of a number of actions as constituting a constructive dismissal on the grounds of breach of trust and confidence, and that the final matter, "the last straw", need not in itself be a breach of contract; see for example **London Borough of Waltham First v Omilaju** (supra).

Ground 3

19. The Employment Judge was wrong to say that the claim was an abuse of the process because it was so long out of time. There is jurisdiction to extend the time for presenting proceedings if it was not reasonably practicable to bring them within the appropriate three-month period; see section 111(2)(b) of the **Employment Rights Act 1996**. I consider that Mr Allen was correct in submitting that the words "not practicable" should be given a liberal interpretation in favour of the employee. This was the view expressed by Lord Denning MR and Scarman LJ in **Dedman v British Building & Engineering Appliances Ltd** [1974] ICR 53. The issue of reasonable practicability is not something, it was submitted, that could be determined at the Rule 12 stage because it was essentially a question of fact.

20. Mr Allen submitted that submission of an ET1 out of time is not an abuse of process because it is open to a Claimant to seek to have time extended. Mr Allen submitted that in the circumstances of the case the correct course for the Employment Judge was to have proceeded under Rule 27, rather than Rule 12, which would have enabled him to receive comments from the Claimant.

The Response and Respondent's Submissions

21. Miss Darwin was anxious to point out that this is apparently the first appeal to the Employment Appeal Tribunal in which Rule 12 has been considered. She submits that Rule 12 provides a mechanism for rejecting claims for substantive defects through the new "sifting" process. The rejection of claims under Rule 12 differs from striking out in that it is done before the claim is accepted and does not involve the Respondent. Rules 26 to 28 provide for dismissing a claim or response by the Employment Judge after the initial consideration (an initial sift) about the claim or response. This differs from striking out because the Employment Judge must form a view about the claim or response.

22. Miss Darwin submitted, as a matter of generality, that the decision by the Employment Judge that the ET1 was an abuse of process was open to her on the evidence that she had. The determination of whether there was an abuse of process was a matter for the discretion of the Employment Judge and could only be set aside on what might be described as conventional **Wednesbury**-type grounds; she referred to the decision of **Aldi Stores Ltd v WSP Group** [2008] 1 WLR 748 and to **Agbenowossi-Koffi v Donvand Ltd (t/a Gullivers Travel Associates)** [2014] EWCA Civ 855. Both the **Aldi** and **Gullivers Travel** cases seem to concern a well recognised type of abuse of process where, after the conclusion of an action, a Claimant brings a separate action that could have been brought with the first action or which in

some way replicates the claims in the first action (that of course is not this case at all). It was submitted by Miss Darwin that if the Employment Appeal Tribunal was wrong to reject the claim it should strike out the claim under Rule 37(1)(e) because it would be impossible to have a fair trial of the claim because the events had occurred seven years before. It is impossible to come to that conclusion in the abuse of process evidence.

23. Miss Darwin did point out one of the features of Rule 12 is that if the Judge considered that the claim or part of it was (*inter alios*) "an abuse of the process", then "it shall be rejected" (my underlining). Miss Darwin maintained that the Employment Judge did not fail to notice the boxes that had been ticked by the Claimant in relation to relief and compensation and in relation to unfair dismissal.

24. Miss Darwin drew my attention to the Government's response to the review of **Employment Tribunal Rules of Procedure** undertaken by Underhill J in March 2013. She submitted there was no reason why the phrase "abuse of process", which was not defined in the Rules, should be given a narrow interpretation, and the phrase was wide enough to encompass a wide range of substantive defects. A decision to reject the claim as an abuse of process, she submitted, was a discretionary matter for the Employment Judge; she referred to **Aldi Stores v WSP Group** [2008] 1 WLR 748 and the **Gullivers Travel** case. She submitted that I should only interfere if there had been a misdirection or if the decision of the Employment Judge was outside the broad band of her discretion.

Ground 1

25. Miss Darwin submitted that although the Claimant, she accepted, did seek in her ET1 re-engagement and compensation, these were remedies that were only available against the Home

Office and not against the Attorney General. It was "very unlikely" that the Employment Judge intended to suggest that the remedies of re-engagement and compensation were not available to an individual pursuing a claim for unfair dismissal but referred to the claims that were made, for example the claim for compensation for the mother which were outside the jurisdiction of the Employment Tribunal. The fact that some of the remedies sought by the Claimant could not be awarded by the Employment Tribunal was a matter the Employment Judge was entitled to have regard to when deciding the Claimant's claim was an abuse of process. It was then submitted that, were I to find that the Employment Judge did err in deciding the remedies of re-engagement and compensation were not remedies the Employment Tribunal could award, the error was not material to the decision and ground 1 should be dismissed. Miss Darwin, as I have said, took me to the Underhill review and the response of the Government and to the legislative history of Rule 12. I must construe Rule 12 as it is, and I am not greatly assisted by the reference to legislative history or to the Government's response to Underhill J's report.

Ground 2

26. Miss Darwin submitted that the use of the word "appear" showed that the Employment Judge had considered the substance rather than the form. She submitted that the Employment Judge really meant that the Claimant was not claiming unfair dismissal but complaining about the failure to re-engage her. The Claimant, she submitted, resigned and then changed her mind, and so the Employment Judge was correct to find there was no claim for unfair dismissal; any error was not a material error on the part of the Employment Judge.

Ground 3

27. Miss Darwin submitted that the Employment Judge was justified in having regard to the fact that the claim appeared to have been lodged some six years out of time because her chances

of satisfying an Employment Tribunal that it was not reasonably practicable for her claim to be presented by 22 February 2008 were negligible. The fact that the claim was so significantly out of time was a factor the Employment Judge was entitled to have regard to when deciding if the claim was an abuse of the Employment Tribunal's process. The limitations of interfering with the discretion of the Employment Tribunal, are set out in **Aldi** and **Gullivers Travel** which were relied upon by the Respondents.

28. Miss Darwin submitted that, notwithstanding the Claimant's ill-health or disability, the Employment Judge, while under a duty to make procedural accommodations in respect of disabled litigants, the duty did not require her to proactively make enquiries of a party as to his or her personal circumstances or as to why the claim form was presented out of time.

29. Mr Allen sought to suggest that the principles on the CPR should be imported into the **Employment Tribunal Rules**. Miss Darwin submitted that the principles underlying the CPR could not be imported into the **Employment Tribunal Rules**; see the Judgment of Langstaff J in **Harris v Academies Enterprise Trust** [2014] UKEAT/0102/14. This does not give me any great assistance in construing the **Employment Tribunal Rules**.

Mr Allen's Reply

30. Mr Allen criticised Miss Darwin's submissions on grounds 1 and 2 in that she was seeking to construct a case as to what the Employment Judge may have had in mind without there being any material to support this. Mr Allen pointed out that the Claimant was specific in making clear she was complaining of unfair dismissal and constructive dismissal. The narrative in the ET1 was sufficient to found a claim for unfair dismissal and, again, Miss Darwin was constructing a case as to what the Employment Judge may have thought.

31. So far as the claim being out of time was concerned (ground 3), the ET1 showed possible arguments available to the Claimant on the basis of reasonable practicability, and these are now confirmed by the documentation provided with the application for reconsideration.

The Law

32. As it seems to me, the effect of a direction under Rule 12 is equivalent to that of striking out. However, the procedure is undertaken without there being a hearing and without receipt of any representations from the Claimant. I bear in mind and adopt the views of Laddie J in **Reckitt Bensicker v Home Pairfum Ltd** [2004] FSR 774. Laddie J said, at paragraph 29, after referring to the Judgment of Simon Brown J in **Wallis v Valentine** [2003] EMLR 8 CA:

> **"29. I accept the generality of that submission. However, I would prefer to express it somewhat differently. The court's powers under the CPR are wide. They should be tailored to meet the circumstances of the case. Although, as *Wallis* shows, the court has power to strike out even a *prima facie* valid claim where there is abuse of process, it does not follow that in all cases of abuse the correct response is to strike out the claim. The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be." (my underlining)"**

33. I am of the view that the overriding objective requires the Employment Tribunal to have regard to any disability of which it knows on the part of a party; see **U v Butler and Wilson** [2014] UKEAT/0354/13 (Judgment handed down 2 September 2014). Wilkie J had this to say:

> **"65. We do not, in this judgment, need to adjudicate upon the extent to which the specific statutory exemptions in the Equality Act 2010 are affected by what is said to be the incorporation of the UNCRPD into domestic UK law. It is sufficient that we agree and accept that the fact of the appellant's disability, as known to the EJ, was an important factor to which she had to have regard when making case management decisions in accordance with the overriding objective and reflecting good practice as advised by the Equal Treatment Bench Book."**

34. I also need to refer to the approach which should be taken under the overriding objective to litigants in person; in this regard I refer to the Judgment of Barling J in **Drysdale v Department of Transport (Maritime and Coastguard Agency)** [2014] IRLR 892):

> **"49. From the authorities to which Mrs Drysdale referred … I derive the following general principles:**

(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.

(2) What level of assistance or intervention is 'appropriate' depends upon the circumstances of each particular case.

(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.

(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.

(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and 'feel' for what is fair in all the circumstances of the specific case.

(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/ omitted to do, and which amounts to unfair treatment of a litigant."

Conclusions

35. The order was a drastic order, having been made without a hearing and submissions. Such orders under Rule 12, in my opinion, should only be made in the most plain and obvious cases. Any borderline case, or cases lacking clarity, or where there is a muddle involving a litigant in person, should be disposed of under Rule 27. Further, in my opinion, the reasons given were inadequate. While I accept it is proper to give relatively short reasons in a decision such as made by the Employment Judge, mere headlines, as given here, are not sufficient, as they do not explain, for example, why the ET1 was an abuse of process. I accept that interference with discretion of an Employment Judge, especially in what might be classed as a close-analogy to a case management decision requires the application of broadly conventional **Wednesbury**-type considerations. There are numerous authorities but Miss Darwin drew attention, in particular, to the speech of Lord Dyson in the **Gullivers Travel** case :

> **"22. Nevertheless, an appellate court will generally only interfere with the decision of the judge where the judge has taken into account immaterial factors, failed to take into account material factors, erred in principle or come to a conclusion that was not open to him."**

36. In the present case I see no conceptual difficulty in setting aside the order of the Employment Judge, having regard to the authorities on interfering with discretionary decisions, because the Employment Judge did not so much take into account immaterial factors but took into account wholly mistaken factors. It is unclear whether the Employment Judge regarded the three matters to which she drew attention as each representing individual and independent grounds for treating the claim as an abuse of process or whether she regarded them as cumulative. There is no definition of abuse of process in any authorities that I have been able to find and counsel were not able to refer me to any authority. Most of the cases to which I have been referred, or of which I have been aware, relate to such matters as collateral attack on an earlier decision, or a failure to bring a claim that should have been brought in previous proceedings relating to the same subject matter. However, I of course accept that if a claim is impossible to respond to or does not disclose a cause of action, it might in appropriate circumstances be regarded as an abuse of process. However, I also bear in mind there is a mechanism to strike out claims that do not appear to have a reasonable prospect of success under Rule 27.

37. Rule 37 provides for striking out and is a step that can be taken on the initiative of the Employment Judge or a party.

38. I reject the Respondent's submissions based upon what the Employment Judge may have had in mind in concluding that no claim had been raised for a remedy that the Employment Tribunal had jurisdiction to entertain and no claim had been made for unfair dismissal; the terms of the Judgment suggest otherwise, and there is a complete absence of reasoning. Although not cited to me, I think it only right that I should refer to Rule 62 of the **Employment Tribunal Rules of Procedure** entitled "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).**
>
> **…**
>
> **(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."**

39. The Employment Judge was in error in suggesting that no remedy had been sought that was within the jurisdiction of the Employment Tribunal. Equally she was wrong in saying that there was no claim for unfair dismissal. I will not repeat what I have previously said about the contents of the ET1.

40. So far as the time issue is concerned, there is sufficient material to show that the Employment Judge should have appreciated that the Claimant may have had significant mental health issues; this is the reason why she perhaps should have considered proceeding under Rule 27. The parties suggest that Rule 37 may have been more appropriate. It is possible that she lacked capacity within the meaning of section 2 of the **Mental Capacity Act 2005**. The mere fact that an ET1 was presented out of time does not mean that it is necessarily an abuse because of the power of the Employment Tribunal to extend time. The evidence that has become available on the reconsideration application suggests that for six years the Claimant was regarded by a consultant psychiatrist as unable to conduct proceedings. It may also be the case that the Claimant for some or all of that period lacked the necessary competence to participate in the proceedings. There is no appeal against the refusal to reconsider so I cannot deal with the matter as an appeal against that decision, however, it is likely in the light of this Judgment and the available medical evidence that, had there been an appeal, I might well have set aside the order with a view to further consideration under Rule 27. In the circumstances, however, I will allow the appeal and set aside the original order. When the Employment Judge reconsiders the pleading, he or she may wish to consider whether it might not be more appropriate to deal with

the matter under Rule 27. If on the other hand, it is decided that the ET1 should be rejected under Rule 12, the Claimant will be able to seek reconsideration and a hearing under Rule 13 and can deploy her medical evidence as to her ability to conduct proceedings and as to the reasonable practicability of presenting them within the three-month time limit or thereafter. It is not every litigant who can produce evidence from a consultant psychiatrist to the effect that for a six-year period she was not able to conduct litigation, so any application by her must hold out at least some hope of success. The Employment Judge may also wish to consider whether Miss Higgins has the capacity to conduct proceedings.

41. For these reasons I allow the appeal and set aside the order contained in the letter that bears the date 10 March 2014. The matter will be remitted to the Employment Tribunal to reconsider the question of rejection of the claim form. In the circumstances, and as Employment Judge Sage has already refused to reconsider her decision, the matter should be dealt with by another Employment Judge.

42. I regret the delay in handing down this judgment but I have been indisposed.