Appeal No. UKEAT/0128/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 September 2016

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

TESCO STORES LIMITED APPELLANT

MISS F KAYANI RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TIMOTHY ADKIN (of Counsel) Instructed by: Squire Patton Boggs (UK) LLP 6 Wellington Place Leeds LS1 4AP
For the Respondent	MS SHEILA ALY (of Counsel) Instructed by: Mayfair Solicitors 77 Hanworth Road Hounslow TW3 1TT

SUMMARY

JURISDICTIONAL POINTS - Extension of time: reasonably practicable

JURISDICTIONAL POINTS - Extension of time: just and equitable

The Claimant had lodged various claims of unfair dismissal and sex (pregnancy related) discrimination, all outwith the relevant three month time limits.

During the statutory three month period the Claimant had instructed solicitors and instructed them to raise proceedings should there be no response from the Respondent to a seven day letter. The Employment Tribunal found that the Claimant was without funds to have those proceedings initiated around the time of the expiry of the time limit. However, standing that she had been in receipt of legal representation and the finding that she had not been advised in relation to fee remission, the Tribunal had erred in failing to address the issue of the adequacy of the legal advice she had received. The failure to grapple with the question of whether the solicitors had been at fault was directly analogous to the situation that had arisen in **eBay (UK) Ltd v Buzzeo** UKEAT/0159/13. The Tribunal in this case had focused only on the Claimant's pregnancy and the imminent birth of her son in considering the reasonable practicability test, when the role of the solicitors was an equally important factor. There was also confusion in the Judgment about the two separate periods - that prior to the expiry of the three month period and thereafter - in the analysis of the evidence.

In approaching the second limb of the test in section 111 **Employment Rights Act 1996**, the Tribunal had regarded the requirement to state the early conciliation number on a claim form as "technical" when the authorities made clear that it was an essential requirement.

So far as the approach to the just and equitable test in section 123 **Equality Act 2010**, the approach of the Tribunal was flawed for similar reasons to those found in the application of the reasonable practicability test.

The appeal was allowed.

THE HONOURABLE LADY WISE

Introduction

1. This is the Respondent's appeal against a Decision of Employment Judge Bedeau dated 2 March 2016 allowing the Claimant's claims to proceed albeit presented out of time. Those claims are for unfair dismissal, breach of contract, wrongful dismissal, accrued unpaid holiday pay, unauthorised deductions from wages and of sex discrimination due to pregnancy. I shall refer to the parties as the Claimant and Respondent as they were before the Tribunal below.

Background

2. The Claimant, a Pakistani national, was employed by the Respondent as a Night Customer Assistant between 22 April 2008 and 12 February 2015. An issue had arisen in 2014 with her failure to provide the Respondent with valid documentation confirming her right to work in the United Kingdom. The documents were eventually provided and the issue resolved. On 27 January 2015 the Home Office Employer Checking Service informed the Respondent that the Claimant did not have the right to work in the United Kingdom. The Claimant was suspended on 29 January 2015 as a result. She failed to attend disciplinary hearings related to the right to work issue and so was dismissed with effect from 6 February 2015, but by letter of 9 February, which she received on 12 February 2015. The Respondent was subsequently advised by the Home Office that the Claimant did have a right to work in the United Kingdom.

3. In terms of section 111 of the **Employment Rights Act 1996** ("ERA"), the Claimant was required to present any claim against the Respondent alleging unfair dismissal before the end of the period of three months from 12 February 2015, namely by 11 May 2015. Section 123(1) of the **Equality Act 2010** ("EqA") requires a sex discrimination complaint to be

presented to the Tribunal within three months of the date of the act to which the complaint relates or within such other period as the Employment Tribunal thinks just and equitable.

4. The Claimant attempted to submit a claim form to the Employment Tribunal on 2 June 2015 using her mobile phone. That purported claim was rejected in the absence of an early conciliation certificate number. A further form, initially presented by the Claimant's solicitors in late August, was accepted as having been received by the Tribunal on 1 September 2015. In those circumstances, the Respondent contended that the claims were brought outside the statutory time limits and that the Tribunal accordingly had no jurisdiction to hear and determine them. A hearing on those matters was fixed. The Claimant gave evidence at that hearing and was cross-examined.

5. The Employment Tribunal made the following material findings in fact in relation to the chronology of events and circumstances of the late presentation of the claim:

> **"5.5. In relation to the claimant's employment position, she contacted her solicitors to seek their advice and was advised that she should speak to her union for assistance to ascertain whether the dispute in relation to her dismissal could be resolved internally. On or around 12 February 2015, she instructed her union representative to engage with the respondent. By the 26 March 2015 there was no resolution. Her union representative informed her that she could pursue her claim before the Employment Tribunal but was not informed told [sic] of the tribunal's time limits.**
>
> **5.6. On the 22 April 2015, her solicitors wrote to Mr Brougham, store manager, stating the following:**
>
> > **"<u>Re: Mrs Farkhanda Kayani unfair dismissal - pre-action protocol letter</u>**
> >
> > **We write further in regards to the above matter.**
> >
> > **We note with utter dismay that we have yet to receive a response to our correspondence of the 26 March 2015, a copy of the postal track and trace receipt is enclosed for ease of reference.**
> >
> > **We will thus be much obliged if you can respond to this letter within seven days. Failing which our client has instructed us to start legal proceedings.**
> >
> > **We thank you for your attention and look forward to receiving your response."**
>
> **5.7. There was no response to their letter. By 29 April, the expected date when the claimant's solicitors were due to issue proceedings, the claimant did not have the funds to instruct them. At that time she was more preoccupied with the imminent birth of her baby. It was her first pregnancy and the expected date of childbirth was 2 May 2015. Her baby was overdue and had to be induced. Her son, Muzammil Shahid, was delivered by caesarean section on 11 May 2015. She had to be detained in hospital for five days and was discharged on 13 May 2015. I**

find that she had a difficult pregnancy having suffered with painful gallstones, problems with her kidneys, a raised blood sugar count, rashes and allergies. She made regular visits to her doctor who prescribed her with medication.

5.8. On the 15 May 2015, when she returned to her rented home, 6 Worton Gardens, Isleworth, Middlesex, the landlord entered the property by force with the assistance of the police and changed the locks. She, her husband and their baby were evicted. She said that at the time she was recovering from the caesarean section operation and was unable to mobilise herself very well.

5.9. In June 2015 the family moved to 39 Fountain Close, Feltham, TW13, a more permanent rental accommodation. While speaking to a friend in or around the end of May or early June 2015, she was informed that she would need to contact ACAS prior to presenting a claim form to the tribunal. On or around the 2 June 2015, the early conciliation certificate was issued giving the date of notification as also the 2 June. However, it had as the proposed respondent, "Tens of Stores". She did not have either an iPad or computer but was able to submit the claim form herself on 2 June 2015 using her mobile phone.

5.10. When she contacted her solicitors she was told that the claim form had been rejected. The reason being that there was no early conciliation certificate. In July 2015 she instructed her solicitors to put in her claim and some time in August 2015, a further claim form was presented … but was rejected by the tribunal 27 August 2015 because there was no early conciliation certificate number given on the form. The claimant's address was also not on the form. On the 1 September 2015, the early conciliation certificate number was provided by the claimant's solicitors and the form was accepted as having been received by the tribunal on the 1 September."

6. Following a summary of the submissions and references to authorities the Employment Judge concluded that it had not been reasonably practicable for the Claimant to have presented her claims within the statutory three months and that her claim was presented within a reasonable time thereafter. The Judge concluded also that it was just and equitable to allow an extension of time in relation to the sex discrimination claim. The Employment Judge's reasoning for these conclusions was in the following terms:

"23. There is no dispute that the claimant was notified of her dismissal on 12 February 2015. The three months [sic] time limit expired on 11 May 2015. As she did not contact ACAS by the 11 May 2015, the early conciliation provisions in section 18A Employment Tribunals Act 1996, do not apply. I accept that she was advised to resolve the issue of her dismissal internally and in that regard she enlisted the services of her union representative from 12 February2015 but by 26 March [she] was unsuccessful. Although she applied for work in March 2015, I do bear in mind that she had instructed her union representative, as advised, to resolve matters internally and then engaged her solicitors to do the same. She contacted her solicitors who wrote on her behalf to the respondent on the 26 March 2015 but without success. They again wrote on the 22 April threatening legal action after seven days if the issue of her dismissal was not resolved. By the 29 April 2015, however, the claimant was fairly close to giving birth, the expected date of childbirth was the 2 May 2015. Her time thereafter was spent in hospital resulting in the baby being induced and delivered by caesarean section on the 11 May 2015.

24. Four days later, she and her husband were evicted from their property. Thereafter they were provided with temporary accommodation moving from one accommodation to the next. I find that at the crucial point in time, namely between the 29 April to 11 May 2015, the claimant was more pre-occupied with delivering a healthy baby and nursing him. I do also take into account that she was recovering from a caesarean section operation which restricted her mobility. She was without funds to pay the issue fee and did not have a settled address. When she was provided with permanent accommodation some time between late May to early

June, she was able to present the claim form on the 2 June 2015 after having contacted ACAS but it was rejected by the tribunal as, apparently, there was no early conciliation certificate. She contacted her solicitors in July to assist and without the required information the form was returned. I accept that from the 2 June to 1 September steps were taken to present the claims to the Employment Tribunal but for technical reasons to do with the requirement to state the early conciliation certificate number, the form was rejected. Although it was finally accepted on the 1 September 2015, I have taken into account the above factors affecting the claimant and have come to the conclusion that it was not reasonably practicable for her to have presented her claims within the statutory three months and that it was presented within a reasonable time thereafter. Accordingly, she is allowed to pursue her unfair dismissal, breach of contract, wrongful dismissal, accrued unpaid holiday and unauthorised deductions from wages claims against the respondent.

25. In relation to her sex discrimination claim, the test is whether it is just and equitable to extend time. I acknowledge that extension of time in discrimination cases is the exception rather than the rule, however, I am required to have regard to a number of matters. I do take into account the reason for the delay, namely that there were a number of factors which militated against the claimant pursuing her claim in time and which resulted in her presenting her claim on 1 September 2015. They are: the fact that she was going through a particularly difficult pregnancy; that the birth of her child had to be induced; that she was recovering from a caesarean section; was evicted from her home and was looking for more settled accommodation which was not provided until either late May or early June 2015; she was advised to pursue her case internally with the respondent; she did not have the funds to pay the issue fee and from the evidence she was not advised about claiming remission. These all contributed to the delay. I acknowledge that she was legally represented but without the funds to issue proceedings there was little her lawyers could have done in the circumstances. She had initially followed advice by attempting to resolve matters internally."

Judge Bedeau then addressed the issue of prejudice, finding that the balance clearly favoured the Claimant.

7. I shall summarise the arguments presented at the hearing before me under a number of separate headings as they were presented to me.

(1) Incorrect Application of the Law on Skilled Advisers

8. The law has long recognised that a failure on the part of skilled advisers to meet a time limit may result more appropriately in a claim against the advisers than in allowing a claim to be lodged late (**Dedman v British Building & Engineering Appliances Ltd** [1973] IRLR 379 CA). The authorities are helpfully summarised in a decision of HHJ David Richardson in **eBay (UK) Ltd v Buzzeo** UKEAT/0159/13, a case in which an Employment Judge's failure to address whether or not a solicitor's advice was negligent in a case of this sort amounted to an error of law.

9. Mr Adkin pointed to the finding that the Claimant's solicitor had failed to apply for fee remission and the failure to insert an early conciliation certificate number on the ET1 form as examples of failures that had delayed the presentation of the claims. The Judgment does not analyse the acting of the solicitors at all. The solicitors had written to the Respondent on 22 April 2015 confirming that they had instructions to raise proceedings in the absence of a response within seven days. The failure to express a view on the solicitors' acting both before 11 May and after June 2015 was, it was submitted, an error of law.

10. Ms Aly, on the other hand, argued that the present case was very different from that of **eBay** in that although the Claimant had been in receipt of some legal advice, the other circumstances of her housing and pregnancy-related issues played a bigger role in the impracticability of her lodging her claims timeously. It was also pointed out that the nature and extent of the advice given by her solicitor was unknown and could not properly have been explored in evidence absent a negligence claim.

(2) The Issue Fee Ground

11. In short, under this head Mr Adkin argued that the Employment Judge had erred in relying on the Claimant's inability to pay the Employment Tribunal's claim fee in reaching the conclusions that he did. The existence of remittance arrangements militated against such a finding and was clearly something within the knowledge of a Tribunal Judge.

12. On the other hand, for the Claimant, Ms Aly pointed out that the inability to pay the fee related only to the period 29 April to 11 May and was only one factor relied on in the Tribunal's conclusion that it had not been practicable to lodge the claims in time.

(3) Errors in the Application of the Test to the Evidence

13. Mr Adkin submitted that the Employment Judge had failed to distinguish between the two separate aspects of section 111(2). The test of whether it was reasonably practicable for the Claimant to have presented her claim within three months had to be applied only to the evidence relating to the period ending 11 May 2015. Considerations of the Claimant and her husband being evicted on 15 May 2015 but having a settled address later that month such that she was able to attempt to present a claim on 2 June appear to have been taken into account as part of the first test of reasonable practicability in paragraph 24 of the Judgment. That was a clear error.

14. It was argued also that the Judge had failed to address the point explored in cross-examination that the Claimant and her solicitor were aware at all material times that she was due to give birth around the time that the three month period expired. In fact, her due date was 2 May 2015. Under a reference to *Harvey on Industrial Relations and Employment Law* (Division PI, paragraph 268) it was emphasised that this was not a case where an unexpected or unforeseen circumstance arose near the end of the three month period. Accordingly, it was for the Claimant to explain the whole three month period in terms of her failure to present a claim. The position expressed in *Harvey*, although relating to postal delays and the like, was analogous to the circumstances of this case.

15. Ms Aly argued that it was wrong for the Respondent to suggest that the Employment Judge should have given a justification for every finding in fact. It was sufficient for him to state that he accepted the Claimant's evidence. The Respondent had called no witnesses. It was not enough that the Respondent considers that the outcome should have been different. There were significant findings about the difficulties that the Claimant had suffered throughout

her pregnancy. This distinguished her situation from that of the Claimant in the **eBay** case, who had instructed solicitors throughout and had had no such difficulties.

(4) The Reasonableness or Otherwise of the Delay Between 11 May and 1 September

16. The Respondent's position is that the pregnancy-related factors, even if relevant, could not have been relied upon after 2 June because the Claimant managed to present a claim form on that date, albeit a deficient one. Again, it was contended that the Employment Judge had erred in "lumping together" a number of factors without analysing which factors were relevant to each of the two separate limbs under section 111.

17. The Claimant's response is to point to the Employment Judge's findings of events during that period. The Claimant had instructed solicitors in July following the rejected claim of 2 June. A further claim had been submitted in August but rejected on 27 August for want of the early conciliation certificate number. The factors giving rise to the delay during this period had been clearly identified by the Judge in his reasoning.

(5) ACAS Early Conciliation Requirements

18. It was argued for the Respondent that the importance of complying with the ACAS early conciliation notification has led to otherwise valid claims being rejected. Attention was drawn, for example, to **Sterling v United Learning Trust** UKEAT/0439/14 and **Cranwell v Cullen** UKEATPAS/0046/14. The Judge treated the ACAS early conciliation requirements as a technicality and, on the Respondent's argument, failed to deal with the submissions made to him about this.

19. The Claimant's position, on the other hand, was that the Employment Judge's reasoning overall is adequate and that his decision falls well within the generous ambit of discretion afforded to him. He did not ignore the ACAS early conciliation issue, but, insofar as it was not resolved until 10 September, counsel for the Respondent had, it was said, agreed a date of 1 September 2015 as the date of presentation of the claim. Only issues before that date went to the issue of delay, and those had been adequately dealt with in the Judge's reasoning.

(6) Just and Equitable Ground

20. Counsel were agreed that all of the factors relevant to the application of the section 111 test were equally relevant to the section 123 test. The issue under this head was whether on the authority of **Mills and CPS v Marshall** [1998] IRLR 494 EAT, the court's power was so wide that there was no real scope to intervene or whether a failure to approach the test by asking the two separate questions identified by Langstaff J in **Abertawe Bro Morgannwg University Local Health Board v Morgan** UKEAT/0305/13 amounted to an error of law.

Discussion

21. In determining this appeal, it is no part of my role to consider what conclusion I might have reached on the evidence led. The issue is whether the Employment Judge who heard the evidence erred in his approach to the task before him. For the following reasons, I have reached the conclusion that he did so err.

22. It is clear that section 111 **ERA 1996** requires an analysis of two separate considerations: first, whether it was reasonably practicable to present the claim within three months; and secondly, if it was not so practicable, whether the claim was nonetheless presented within such a further period as the Tribunal considers reasonable. What seems to have occurred

in this case is that the Employment Judge conflated those two separate considerations into one and so took into account irrelevant considerations in concluding that it was not reasonably practicable for the Claimant to have presented a claim on or before 11 May 2015. In so doing, he erred also in failing to take into account material factors that required to be addressed before he could reach a conclusion on the issue before him.

23. On the facts found at paragraphs 5.5 to 5.7 of his Judgment, which I have set out above, it is clear that prior to the expiry of the three month time limit the Claimant had instructed solicitors to start legal proceedings in the absence of any response to the seven-day letter sent on 22 April. The finding of fact that by 29 April the Claimant did not have the funds to instruct those proceedings, taken together with the reference in paragraph 25 of the Judgment that the Claimant was not advised about claiming remission, required the issue of the adequacy of the legal advice received by the Claimant during the three month period to be addressed by the Employment Judge.

24. Paragraph 17 of the Judgment records the requirement to take such a factor into account in applying the law to the facts in a reasonable practicability case. I do not suggest that an inference of negligence was the inevitable outcome in this case. It is the failure to explore what seems to have been a significant event in the absence of timeous proceedings being raised, namely the impact of the lack of advice about fee remission, that matters. To the extent that there was a failure to grapple with the issue of whether the solicitors were at fault, this case is directly analogous to the situation that arose in **eBay**. While the potential failure here was to advise on fee remission so that proceedings already instructed by the Claimant could be raised in time, the principle is the same. It is essential for the Tribunal to consider the role of the solicitor where one was instructed. Counsel representing the Respondent at the hearing before

A the Employment Judge had flagged up in his written argument that an issue arose as to whether this was a case of negligence where the remedy lay against the solicitor.

B 25. Further, the birth of the Claimant's baby had been anticipated throughout the three month period, and the due date was 2 May; so, nothing unexpected occurred in relation to that such as would have prevented the raising of proceedings. These two points - the absence of funds to raise proceedings as instructed and the imminent birth - are the only two factors that C could have been relied on in considering the reasonable practicability limb of the test. Accordingly, it was incumbent upon the Employment Judge to consider both of those. Instead, in his reasoning at paragraph 24, he relies only on the preoccupation with the birth in relation to D the period 29 April to 11 May. He then appears to confuse the two periods by indicating that the Claimant was without funds to pay the issue fee and did not have a settled address, but those factors on the evidence related to different periods and so to different stages of the two limb test.

E

26. It is not clear that the Employment Judge understood the distinction between the evidence relevant to reasonable practicability and that relevant to whether proceedings had been F raised within a reasonable time after the expiry of the time limit. For that reason alone, the reasoning is erroneous and cannot stand.

G 27. So far as the second limb of the test in section 111 is concerned, I consider that the Employment Judge has again ignored material considerations and relied on irrelevant considerations. For example, he refers to the Claimant recovering from a caesarean section, but H that could not be used as supporting the reasonableness of the delay after 2 June 2015 when an application was presented. The length of the period 2 June to 1 September, a delay of equal

length to the period afforded to the Claimant to lodge her claim following dismissal, is not analysed in any detail at all. There is the simple statement that during that period steps were taken to present claims, but:

> **"24. … for technical reasons to do with the requirement to state the early conciliation certificate number, the form was rejected. …"**

28. This approach was flawed for three reasons. First, there is ample authority to support the contention that, far from being a technical matter, compliance with the rules on early conciliation is an essential requirement of a claim, and there is no discretion to avoid the consequences of a failure to comply (**Sterling** and **Cranwell**). Secondly, there is no attempt to consider the reasonableness or otherwise of taking three months to remedy the initial failure to comply with those requirements in the application of 2 June 2015. Thirdly, the adequacy or otherwise of the solicitors' actions during this period are not commented on at all. There was unchallenged evidence about this, which was a material consideration ignored by the Judge.

29. These are the principal reasons for my conclusion that the Employment Judge erred in his approach to application of the section 111 test.

30. So far as the "just and equitable" ground under section 123 is concerned, the test is a different one, and there is no doubt that the term "just and equitable" "could not be wider or more general" (**Mills**). However, section 123 also requires two separate questions to be asked (**Abertawe**). Again, there was a failure on the part of the Employment Judge to illustrate in his reasoning at paragraph 25 that he understood that. For the same reasons as those relied upon for the section 111 test, I consider that he erred on that matter too. It seems to me that in approaching both the section 111 **ERA 1996** test and that in section 123 **EqA 2010** the Employment Judge failed to appreciate the importance of analysing carefully why the time limit

had not been met, including the acting of both the Claimant and her solicitor, before addressing the question of whether the period after the expiry of the time limit had been properly accounted for. The reasoning is both opaque and insufficient on these issues, and the decision is accordingly unsound in law.

31. For completeness, I record that I accepted the argument by counsel for the Claimant that any issue about the effective date of presentation of the claim could not now be opened up, standing the finding of the Employment Judge that the claim should be taken as having been presented on 1 September. While there may have been no formal concession to that effect, counsel before me appear to be in disagreement as to the extent to which the point about Rule 13(4) in relation to the rectification of a defect changing the date of presentation was argued. As it has turned out not to be material to my decision, I simply record that disagreement.

Conclusion

32. In all of the circumstances, I shall allow the appeal. Counsel were agreed that if this was the outcome then I should remit the question of extension of time to a freshly constituted Tribunal; I will so order.