Appeal No. UKEAT/0177/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 September 2016

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

MR M PUGH — APPELLANT

RT ELECTRICS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM KIRK (of Counsel) Bar Pro Bono Scheme
For the Respondent	MRS BIANCA HUGGINS (of Counsel) Instructed by: DAS Law DAS House Quay Side Temple Back Bristol BS1 6NH

SUMMARY

PRACTICE AND PROCEDURE - Estoppel or abuse of process

PRACTICE AND PROCEDURE - Review

The Claimant had brought a number of claims against his employer, the Respondent. A Preliminary Hearing had been fixed to determine all issues of time bar raised by the Respondent. An Employment Tribunal decided that one of the claims (Claim 4) had been brought after the expiry of the three month period in the **Equality Act 2010**, but that it would be just and equitable under section 123 of that Act to allow it to proceed.

After a final hearing before a second, separate Tribunal and on the basis that the evidcne supported only a single incident in the early part of the period covered by Claim 4, that claim was dismissed on the basis that it was out of time and the Tribunal accordingly had no jurisdiction to uphold it. The claim would have been established but for the time limit issue.

Held: allowing the appeal -

The second Tribunal had erred in a number of ways in its approach to the time bar issue. No consideration had been given to the principles of *res judicata* or issue estoppel in relation to the first Tribunal's decision on the time bar point. In the absence of an appeal, that decision was binding on the subsequent Tribunal. Further, the decision of the second Tribunal to interfere with the Preliminary Hearing Judge's decision could not be characterised as a reconsideration. Reconsideration of Judgments is not a concept developed at common law and is available only using the mandatory procedure prescribed in the Rules contained in Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. None of the relevant Rules applicable to reconsideration had been followed by the Tribunal. The procedure had been unfair, depriving the Claimant of the right to be heard on the issue.

In any event, reconsideration would not have been required in the interests of justice. The proper outcome following the final hearing was that the Claimant had succeeded in a limited part of his claim.

Appeal allowed and Order in Claimant's favour substituted.

A **THE HONOURABLE LADY WISE**

B 1. This is an appeal by the Second Claimant, Mr Pugh, only, both Claimants' claims having been dismissed by an Employment Tribunal chaired by Employment Judge Beard in a Judgment dated 29 September 2015. In early 2014 the Second Claimant brought a number of claims against his former employer, the Respondent. He had been employed by the Respondent since 2001. In 2010 he was diagnosed with Crohn's disease, a debilitating condition, which, C although he has periods of being symptom free, renders him disabled. The Respondent was aware of his condition.

D 2. The claim relevant to this appeal was ultimately designed as "Claim 4" within a schedule listing the indirect disability discrimination and failure to make reasonable adjustment claims. Insofar as material to this appeal, that claim was in the following terms:

> **"2010-2013. I had to have a hepatitis injection as we often go into sites where there are serious**
E **health risk's [sic] because I'm on immune suppressants my body rejected this injunction [sic], I explained to the employer and he did nothing but continually kept me on such sites."**

3. The Respondent took issue with whether a number of claims should proceed. Following F a hearing on 4 August 2014 Employment Judge Thomas, in a Judgment of 28 October 2014, decided, amongst other matters, that Claim 4 of Mr Pugh's disability claim would proceed as he could not be certain that it had no reasonable prospect of success. Thereafter it was decided (on the Respondent's application) that a Preliminary Hearing would be held to determine which of G the claims were in time and for any that were not whether it would be just and equitable to extend time. That hearing took place on 16 February 2015 before Employment Judge Povey, who issued a Judgment on 17 March 2015. The relevant part of the Judgment insofar as it dealt H with Mr Pugh's claims was in the following terms (paragraph 2.4):

> **"2.4. Claim nos. 2, 4 and 5 from his disability discrimination schedule were brought after the end of three months but within a period that was just and equitable under section 123 of the Equality Act 2010 and the Tribunal has jurisdiction to determine them."**

4. Accordingly, Claim 4 for Mr Pugh was one of those sent for final hearing. The unanimous Judgment of the Tribunal on that claim was expressed in the following way (paragraph 10):

> **"10. The second claimant's claim of disability discrimination pursuant to section 19 of the Equality Act 2010 is not well found and is dismissed and, insofar as it relates to the claimant's contention about attending sites where there were attendant health risks, the claim is out of time and the tribunal has no jurisdiction to uphold it."**

5. The Tribunal found that the claim about being required to work at sites where there might be a risk of infection and that the Respondent failed to make the necessary reasonable adjustment "would be established subject to time limits".

6. In essence, the issues now raised in this appeal are whether the Employment Tribunal was entitled to consider the question of time limits anew and if so whether it was unfair to do so without notifying Mr Pugh that it might do so and giving him a reasonable opportunity to be heard on the matter.

7. Mr Pugh's argument is based first on the principles of *res judicata*. Mr Kirk submitted that it is well established that the principles of *res judicata* apply equally to Employment Tribunals. In any event, estoppel may operate to prevent parties reopening an issue such as extension of time that has already been determined (**Hutchison 3G UK Ltd v Francois** [2009] ICR 1323). The fact that only a jurisdictional issue has earlier been dealt with does not prevent an issue estoppel being raised, albeit restricted to that jurisdictional issue (**Nayif v High Commission of Brunei Darussalam** [2015] IRLR 134).

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8. In anticipation of the Respondent's position, the question of whether the Tribunal's decision on time bar could be regarded as a decision on reconsideration taken on the Tribunal's own initiative was addressed. Mr Kirk submitted that there was no basis for characterising the decision in that way. First, the Judgment made no mention of Rule 73 of the Rules in Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, which gives the power to reconsider. Secondly, the Judgment records in terms that the decision by Employment Judge Povey on time limits had "never been challenged and we are bound by it" (ET Judgment, paragraph 4). Notwithstanding that the Tribunal then sought to make a different decision on Mr Pugh's Claim 4, such a course was irreconcilable with the acknowledgement of the binding nature of Employment Judge Povey's decision.

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9. In any event, there had been no attempt to follow the procedure prescribed by Rule 73, which requires that the original decision shall be considered at a hearing unless such a hearing is not necessary in the interests of justice. Rule 72(2) also makes clear that if reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations. Neither the requirements of Rule 73 nor Rule 72(2) was complied with in the present case. Judgement was reserved without any suggestion that the Tribunal might consider the question of jurisdiction.

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10. Further, Rule 72(3) requires that parties are entitled to be heard at a hearing on the issue being reconsidered unless such a hearing was not necessary in the interests of justice, and that was patently not done. The procedure laid down in Rules 72 and 73 is, it was submitted, mandatory. Reconsideration must be made by the Judge who made the original decision, which failing the President, vice-President or a Regional Judge appoints another Employment Judge to deal with the application (Rule 72(3)). That only occurs where it is "not practicable" for the

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original Judge to deal with the reconsideration, an expression that has been interpreted as meaning "not feasible" rather than simply "inconvenient" in the case of **Papajak v Intellego Group Ltd** [2014] UKEAT/0124/12. It was accepted that the subsequent decision in **Benney v DEFRA** [2015] UKEAT/0245/13 was to the contrary, but **Papajak** was not put before the EAT in that case. In short, none of the Rules on reconsideration had been considered by the Tribunal at all.

11. Employment Judge Povey's decision was clearly a Judgment within the meaning of Rule 1(3)(b)(ii). It determined, finally, the jurisdictional issue of whether the claim was in time and if not whether an extension should be granted.

12. It was further submitted that the Tribunal's discretion to reconsider under Rule 73 is not unfettered. Even if there were power to reconsider Employment Judge Povey's decision, it was not in the interests of justice to do so, for a number of reasons. First, Employment Judge Povey had heard full submissions and made findings as to where the balance of prejudice lay. Secondly, the very issues relied on by the Tribunal had been focused by Employment Judge Povey. Thirdly, the Claimant's pleaded case did not change following Employment Judge Povey's decision; so, no issue of fresh evidence arose. Further, the issue of prejudice "cut both ways", as Employment Judge Povey recognised. The Tribunal erred in finding that the Respondent was so prejudiced given the ultimate concession by the Claimant's attendance in 2011 at the site in question.

13. In addressing the second ground of appeal, Mr Kirk argued that there had been a lack of reasonable opportunity to be heard, whether as a breach of natural justice or in terms of the Rules. In essence, Mr Pugh had a legitimate expectation that the time limits issue had been

A determined. He was not legally represented, the issue of reconsideration was not put to him, and it was not suggested that he could or should make representations on the matter.

B 14. For the Respondent, Mrs Huggins submitted that Employment Judge Povey had relied on the continuing act aspect of Claim 4 in allowing it to proceed. The Tribunal chaired by Employment Judge Beard were alive to the decision of Employment Judge Povey and set out the reasoning for their review of that decision at paragraph 48.2.2 onwards. The Judgment, at C paragraph 48.2.4.1, highlighted that the factual foundation was very different from that before Employment Judge Povey. The pleaded case before Employment Judge Povey was that of a continuing act with the last of those alleged acts being on or around October 2013, whereas D before the Tribunal at the final hearing it was found to be a one-off incident. Only the Tribunal chaired by Employment Judge Beard had investigated the facts.

E 15. It was submitted, further, that Rule 73 gave the Tribunal an unfettered discretion to reconsider a decision of its own initiative if it is in the interests of justice to do so. The relevant evidence had come to light during the five-day hearing that it was not a continuing act but a single act on 16 December 2011 that gave rise to Mr Pugh's Claim 4. This was materially F different to that which was considered by Employment Judge Povey, and accordingly it had been just and equitable for the Tribunal to reconsider the original decision. As what was found was an isolated incident and not a continuing act as originally pled, that gave rise to the power G to reconsider.

16. It was further submitted that the Tribunal did not err in reconsidering the earlier decision given the evidence before it. In a case where the Tribunal had previously given the benefit of H the doubt and that decision was likely to have been different if Employment Judge Povey had

A been aware that it was an isolated incident, it was appropriate so to reconsider. Reliance was placed on the case of **SQR Security Solutions Ltd v Badu** [2016] UKEAT/0329/15. It was emphasised that the power to vary a Judgment following a reconsideration is sufficiently wide to allow a Tribunal to reverse its original decision. For example, a finding of unfair rather than fair dismissal could be substituted. Reliance was placed in this context on **Stonehill Furniture Ltd v Phillippo** [1983] ICR 556. In this case, it was in the interests of justice to review the earlier decision, and the position would have been no different under the previous Rules. Reference was made to **Outasight VB Ltd v Brown** [2014] UKEAT/0253/14. The case of **Munir v Jang Publications Ltd** [1989] ICR 1 was relied on in support of a second Tribunal being able to reach a different conclusion on the basis of similar but not identical evidence.

17. On the second ground of appeal, Mrs Huggins argued that it was accepted that the list of issues submitted at the commencement of the hearing did not make reference to the time limit issue. However, the fact that it was an isolated incident had only become evident during the hearing, and it was clear from the written submissions submitted on behalf of the Respondent that the time bar point was to be raised.

18. The Respondent had raised in submissions that all matters were out of time. In response, Mr Pugh had not suggested that submissions should be heard on this point until the stage of the grounds in the present appeal being amended. It had not earlier been raised by Mr Pugh that he had not had the opportunity to address the time point. That was the position when he made his initial application for a reconsideration.

19. In all the circumstances, it was submitted that the appeal should be dismissed.

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20. I have reached the view that the Employment Tribunal chaired by Employment Judge Beard made a number of errors in its approach to the time limit issue in Claim 4. First, the Tribunal decided to reopen the issue of time limits without any consideration or analysis of *res judicata* and issue estoppel or even the procedure that could be adopted if there was power to reconsider the issue. For the reasons I give below, I do not consider that the Tribunal had power to reopen the issue of jurisdiction to hear Claim 4, which had been finally judicially determined. If I am wrong about that, a reconsideration was in principle open to the Tribunal, then I am in no doubt that the way in which the Tribunal approached reconsideration was so procedurally unfair that the decision cannot stand.

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21. On the issue of *res judicata*, it is well established that the Judgment of an Employment Tribunal is binding as between the parties such that they may not litigate the same issue in future proceedings. The basis for the doctrine is the need for finality of litigation. A useful summary of the current position is provided in *Harvey on Industrial Relations and Employment Law* at paragraphs 1006-1026.

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22. In my view, the correct analysis of what occurred before Employment Judge Povey is that he was asked to determine, amongst other things, the issue of whether Claim 4 was out of time and if so whether it was just and equitable to allow an extension of time so that the Tribunal had jurisdiction to conduct a subsequent fact finding exercise in relation to it and make a substantive determination. It was the Respondent who sought to separate the issue of jurisdiction and have a determination of it separate from the fact finding exercise.

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23. Employment Judge Povey's determination was that it was just and equitable for the Tribunal to take jurisdiction over Claim 4. That decision was not challenged by the Respondent

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A on appeal, with the result that an issue estoppel operated to prevent a subsequent challenge to jurisdiction at the final hearing stage. As the Claimants were not legally represented, the single reference to time limits that appears to have been made by the Respondent's counsel in submissions to the Tribunal seems to have passed without comment. It was for the Tribunal to understand the significance of any attempt to revisit an issue already determined and to question it, but it appears to have omitted to do so.

C 24. Much emphasis was placed by the Respondent's counsel on a timesheet, produced by the Respondent late in the final hearing, that supported a contention that Mr Pugh had worked at a site giving rise to Claim 4 on only one occasion and that was in 2011. It was said that this changed entirely the case that the Tribunal found established. However, in my opinion it is more appropriate to characterise what occurred as the Claimant having established a more limited claim than was first pled. The claim was made out but only for a single date and not for a continuing period. To some extent, that possibility was foreseen by Employment Judge Povey when he determined the issue of time limits and jurisdiction. He noted that one of the factors he had to consider was that (paragraph 13):

> **"13. … disability discrimination claims numbered 2 and 4 - the extent to which the Respondent in particular would be prejudiced in answering allegations which are potentially five years old. …"**

25. Thus he took the earliest date included in the claim at that time (2010) in testing whether it would be just and equitable to extend time. While he did also record the fact that those claims, including Claim 4, were pled as continuing acts running through to October 2013, it does not seem that the later date was the basis for the extension of time being allowed. The central factor was, quite properly, the balance of prejudice, and on that basis Judge Povey considered that the danger of stale or historic evidence would weigh as heavily against the Claimant as it would against the Respondent. Employment Judge Povey's conclusion, at

A paragraph 15 of his Judgment, puts beyond doubt that the balance of prejudice was the crucial consideration in allowing the disability discrimination to proceed, albeit out of time.

B 26. In my opinion, Employment Judge Povey made a final determination on the issue of whether the claim in question could proceed despite being made out of time. He could have refrained from making a final decision on the matter. He could have directed that the issue of extension of time be held over until the evidence was heard and relevant findings made. The C Respondent's argument that there was no jurisdiction to hear the claims would then have been preserved. The Claimants would have been put on notice that the issue was still live and had not been finally determined. Instead, Mr Pugh relied on a Judgment, against which no appeal D was taken, that any time bar issue had been resolved in his favour. The case of **Munir v Jang Publications Ltd** [1989] ICR 1 referred to by the Respondent does not, in my view, assist, because it involved different legal issues being litigated where the factual background was the same or similar. In this case, the legal issue was the same before the two Tribunals. In short, E the issue of time limits had been adjudicated upon and could not be reopened by the subsequent Tribunal.

F 27. Turning to the issue of reconsideration, I reject the contention that what the Tribunal did in this case was, on its own initiative, effect a reconsideration of Employment Judge Povey's Judgment. First, it is not contended that any argument that reconsideration of Judge Povey's G Judgment was permissible and appropriate was properly before the Tribunal. Secondly, the Tribunal Judgment makes no reference to reconsideration, far less to the applicable Rules relating to it. Thirdly, had the Tribunal considered that it was embarking on a course of H reconsideration, it would have required to apply Rules 70-73. That would have involved addressing issues such as: (1) informing the parties of the reasons why the decision was being

reconsidered (Rule 73); (2) whether a hearing was, in the interests of justice, unnecessary (Rule 72(2)); and (3) whether it was practicable for the Employment Judge who made the original decision to undertake the reconsideration and if not, the process by which another Judge should be appointed (Rule 72(3)). No suggestion was made to me that it would not have been practicable for Employment Judge Povey to undertake the task. Whether "practicable" in this context is to be interpreted as "feasible" or merely "convenient" does not matter for the purposes of this decision. It is the absence of any analysis of the requirements for reconsideration that leads me to conclude that the Tribunal did not properly consider whether that was the basis upon which they could interfere with the decision to allow Claim 4 to proceed.

28. Reconsideration of Judgments is not a concept developed at common law. It has a particular meaning in a special type of Tribunal created by statute. While the authorities can indicate that where reconsideration is undertaken within the Rules its scope is extensive enough to allow reversal of a substantive decision (**Stonehill**), the Rules are in mandatory terms and must be applied before any such reversal could be contemplated.

29. In any event, for the reasons listed by Mr Kirk, I do not consider that the interests of justice demanded reconsideration in this case. I reject the contention that this was a case that fell within the **Ladd v Marshall** [1954] EWCA Civ 1 rules on fresh evidence. The timesheet referred to was not evidence that went to the issue of where the balance of prejudice lay in a decision to extend time limits. It was merely an adminicle of evidence that resulted in Mr Pugh's claims succeeding only in part.

30. For all of these reasons, I consider that the first ground of appeal succeeds. The Tribunal should have given effect to its own findings that Mr Pugh had established, in part, his claims of disability discrimination and failure to make reasonable adjustments.

31. Had I decided that it was open to the Tribunal to revisit the question of jurisdiction, I would have found that the way in which it did so was procedurally unfair and deprived Mr Pugh of a fair hearing on the matter. No opportunity was given to Mr Pugh to make submissions on the issue of time limits against a background of his having understood that the issue had been determined. His lack of legal representation exacerbated the unfairness as already indicated.

32. I heard submissions about the appropriate disposal in this case. Counsel were agreed on what should happen if the Claimant succeeded on the first ground. The facts having been established by the Tribunal, the inevitable outcome of my decision is that paragraphs 10 and 11 of the Judgment must be set aside and an Order substituted that the indirect discrimination and lack of reasonable adjustments claims succeed on the limited factual basis established. There is no need to remit back to the Tribunal, as the claims would have succeeded but for the erroneous approach to revisiting time limits.

33. Had I found for the Claimant only on the second ground of a procedural unfairness, I would have remitted back to the Judge whose decision was to be reconsidered, namely Employment Judge Povey, so that he could do so in accordance with the Rules.

34. For the reasons I have set out, the appeal is allowed, and I shall substitute for paragraphs 10 and 11 of the Judgment the Order sought by Mr Pugh.