Appeal No. UKEAT/0053/15/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 July 2015

Before

THE HONOURABLE MR JUSTICE WILKIE

(SITTING ALONE)

EZI FLOOR TRADING LLP — APPELLANT

(1) MR N UL-HAQ (DEBARRED)
(2) EZI FLOOR LIMITED (DEBARRED) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADAM SOLOMON (of Counsel) Instructed by: Schofield Sweeney LLP Church Bank House Church Bank Bradford BD1 4DY
For the Respondents	Respondents debarred from taking part in this appeal

SUMMARY

PRACTICE AND PROCEDURE - Review

The Employment Judge failed, in refusing to extend time for applying for a reconsideration, to demonstrate that he had given any consideration to the underlying merits of the party making the application.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. This is an appeal by Ezi Floor Trading LLP against a decision of an Employment Judge sitting at Leeds, who gave his Judgment on 7 May 2014, which was to refuse the Appellant's application for reconsideration of a Judgment dated 3 October 2013 by reason of the fact that it was made outside the time limit pursuant to Rule 71 of Schedule 1 to the **2013 Regulations**.

The Facts

2. It is necessary to go into the history of the matter and the way that it has come before this Tribunal. There are two Respondents to the appeal. The First Respondent is Mr N Ul-Haq, who was the Claimant before Tribunal. The Second Respondent is a company known as Ezi Floor Limited, which was the First Respondent to Mr Ul-Haq's claim in the Tribunal. The present Appellant, LLP, became the Second Respondent to that claim in circumstances to which I will refer. Both Respondents to this appeal have failed to lodge an answer and have, therefore, been debarred from presenting arguments at this appeal and neither has been present or represented.

3. Mr Ul-Haq made a claim against Ezi Floor Limited by an ET1 in which he said that he had been employed by that company since 1 December 2008 until, he claimed, he was unfairly dismissed on 18 January 2013 in circumstances which he set out at Section 5.2 of his ET1. Ezi Floor Limited, as Respondents, submitted an ET3. They accepted that the Claimant's employment had been between the dates alleged but denied his claim for unfair dismissal on the basis that, it contended, Mr Ul-Haq, rather than being dismissed on 18 January, on or about that

time, informed his boss, Mr Iqbal, that he would not be returning to work. That contention is set out briefly at paragraph 5.2 of the ET3. The ET3 concludes with the following words:

"Since 1st May 2013 Ezi Floor has become an LLP (a limited liability partnership)."

4. It appears that the current Appellant did become the successor to Ezi Floor Limited's business in circumstances which, I am informed, were the subject of submissions before the Tribunal on 7 May 2014. Submissions have been made by Mr Solomon on behalf of the LLP that it must be the case that those submissions should result in the conclusion that Ezi Floor Trading LLP could not be liable to Mr Ul-Haq as Mr Ul-Haq was never employed by them.

5. Be that as it may, on 25 September 2013 a hearing took place between Mr Ul-Haq and Ezi Floor Limited on liability for the unfair dismissal claim by Mr Ul-Haq against Ezi Floor Limited. Ezi Floor Limited was not present and not represented, and Mr Ul-Haq represented himself. The Judgment of an Employment Tribunal was sent out to the parties on 4 October 2013. The first order was to amend the claim form so as to add Ezi Floor Trading LLP to the proceedings as the Second Respondent. It must be a matter of speculation, but it may be that the addition of LLP as Second Respondent was triggered by the concluding words in the ET3. There is no material upon which this Tribunal can know whether the amendment was applied for by Mr Ul-Haq or was of the Tribunal's own initiative. In any event, the Tribunal, on liability, found that the complaint of unfair dismissal succeeded and the Respondents were ordered, jointly and severally, to pay compensation to the Claimant in a sum totalling £27,000-odd, of which the recoupment regulations applied in respect of £12,200-odd.

6. Thus, when the Judgment was sent to the parties on 4 October 2013, it appears that that would have included LLP, which was, by that stage, one of the parties. Indeed, in the bundle there is a document dated 4 October 2013, enclosing a copy of the Employment Tribunal's

Judgment, directed to Ezi Floor Trading LLP at the same address as had been identified by Ezi Floor Limited.

The Appellant's Case

7. On 22 November Ezi Floor Trading LLP wrote to the Employment Tribunal on headed notepaper, which identifies its address as the same address as that to which the Judgment had been sent and the same address as had been set out by Ezi Floor Limited in the documentation thus far to the Tribunal. It reads as follows:

> **"The above case was heard on 25th September 2013 before Judge Keevash. We have received a judgment from this tribunal citing us as the Second Defendant in this matter. Nadeem Ul Haq is not an associate of this company, has no connection with this company and we have not had the service of any documents from the court or elsewhere in relation to this matter therefore we are astonished to receive this Judgment of the court. We are a separate entity to Ezi Floor Ltd and operate from an entirely different address.**
>
> **Our name should be struck off from this judgment or in the alternative the matter listed for an application to set aside judgment in which we will require service of all documents in this matter to further the application."**

That is signed by a person, on behalf of LLP, and a copy was sent to solicitors, from whom, it may be inferred, some advice had been obtained, but who were not on the record.

8. On 6 December 2013 the Employment Tribunal sent a letter to Ezi Floor Limited, in the name of Mr Karim, who, it is accepted, was the moving spirit behind both of these companies, at the same address as had been used by both Ezi Floor Limited and LLP. It is in respect of a claim which was identified as between Mr Ul-Haq and Ezi Floor Limited, not referring to LLP, and it reads:

> **"Your application for a reconsideration of the judgment made on 3 October 2013 is rejected. The application is made more than 14 days after the decision was sent to the parties and you have given no explanation for the delay. If you want the decision to be varied or revoked, you must identify why the original decision is said to be wrong. You have not indicated whether the application has been copied to the other parties and it is not in the interests of justice for this requirement to be dispensed with."**

9. It appears that, because this letter was addressed to Ezi Floor Limited, it did not come to the attention of LLP, even though it was sent to the same business address, because, on 11 December 2013, a further letter was sent by LLP, though this time not copied to solicitors, which begins:

> **"We wrote to you several weeks ago and have had no further correspondence in this matter. …"**

Having indicated that they had received a Judgment against them, stated that they were not put on notice of any application to join them as a party. They repeat what was said in the earlier correspondence, but add:

> **"… We are a separate legal entity to Ezi Floor Ltd and operate from an entirely different address which is perhaps where the confusion may have arisen."**

It appears that, insofar that is put forward as a reason for any delay, it is something of a red herring because they certainly were operating, at that stage, from an address from which Ezi Floor Limited had been trading, although it appears that, subsequently, Ezi Floor Limited may have occupied a different address. Thus far matters are confused and the paperwork at the Employment Tribunal does not seem to have caught up with the order made by Judge Keevash to add LLP as a Second Respondent.

10. This state of confusion is further evidenced by a letter from the Tribunal to LLP. It would appear a similar letter must have been sent to Ezi Floor Limited. This letter is in the case of Mr Ul-Haq against Ezi Floor Limited, as the First Respondent, and Ezi Floor Trading LLP, as the Second Respondent. It is notification of notice of a claim made by Mr Ul-Haq against both Respondents. It says:

> **"The Employment Tribunal has accepted a claim against the above respondent. It has been given the above case number, which should be quoted in any communication relating to this case.**
>
> **A copy of the claim form is enclosed for the respondent."**

It then sets out, in standard terms, the obligation of the Respondent to whom notice is being given, LLP, to respond to the claim on a prescribed form.

11. LLP duly responded in an ET3 in which it set out the case, which was apparent from the earlier correspondence, that it accepts that the Claimant was employed by the First Respondent from December 2008 until 18 January 2013. It states that the Second Respondent became a Limited Liability Partnership on 13 November 2012 and contends that at no time was the Claimant ever employed by the Second Respondent and that they have no liability for his employment or its termination. I should add that, at the conclusion of the ET3 for LLP they are said to be represented by solicitors different from the ones who had been copied in to the earlier correspondence. Those solicitors have remained on the record for LLP and have represented it for the purposes of this appeal.

12. The First Respondent also submitted an ET3. It was represented by the same firm of solicitors. It sets out, as its address, a different address from that which had previously been notified to the Tribunal, an address in Hanover Street, Keighley. It joins issue with the substance of the claim, accepting that Mr Ul Haq was employed by the First Respondent between December 2008 and 18 January 2013 and contending that he was not dismissed but resigned.

13. An odd feature of what occurred is that, in neither of the ET3s is it pointed out that there has already been a liability hearing in respect of this claim. It appears that the error was picked up within the Tribunal Service by Employment Judge Keevash, who had, of course, delivered the original Judgment. By a letter dated 20 March 2014 to the solicitors, who were acting for

both Respondents, the Tribunal wrote that the matter had been reviewed by Employment Judge Keevash and it continues:

> **"… He notes that owing to an administrative error the proceedings were served on both Respondents by letter dated 17th January 2014. This was an error because there was a Judgment against both Respondents and the 2nd Respondent's application for a reconsideration of that Judgment had been rejected by letter dated 6th December 2013.**
>
> **In accordance with the overriding objective an Employment Judge has directed that the Responses which have been entered on behalf of the Respondents on 14th February 2014 be treated as applications for a reconsideration of the Judgment. This matter will be listed for a Reconsideration hearing."**

The Employment Tribunal Decision

14. That hearing, and the decision arising from it, is the decision which is the subject of this appeal. It was held on 7 May 2014. The Claimant was in person. The First Respondent was not present and not represented. Although, it appears, that at one stage they were represented by Mrs Wilson, by the stage of 7 May it appears that she was not instructed to represent them at the hearing. However, she was present representing the Second Respondent. This must, I think, follow from the fact that what was being considered by Judge Keevash was an application by the Second Respondent for consideration of the Judgment of 3 October. It appears, from the terms of the note at the bottom of the Judgment, that Judge Keevash decided the application on 7 May, and gave Reasons orally. The Judgment itself was not finalised until 29 May and sent to the parties on 30 May 2014 and was, in terms:

> **"The Second Respondent's application for Reconsideration of the Judgment dated 3rd October 2013 is refused because it was made outside the time limit under the provisions of Rule 71 of Schedule 1 to the 2013 Regulations."**

15. As is noted at the foot of the Judgment, provision is made for a request for Written Reasons to be made within 14 days of the sending of the decision. Such a request was made and Written Reasons were sent to the parties on 8 July 2014. In those Reasons the Judge reviewed the background to the proceedings, more or less as I have set them out, culminating with the matter being listed for a Reconsideration hearing. It is recorded that Mr Karim gave

evidence on behalf of the Second Respondent and that the Tribunal considered a bundle of documents. The relevant law is made set out. Under the heading "Submissions" the Judgment says:

> **"4. Mrs Wilson made submissions. Where appropriate these will be referred to in the discussion part of these reasons. The Claimant chose not to make any submissions."**

16. There is then a discussion section which contains the reasoning of the Judge. The Judge refers to the evidence of Mr Karim and makes findings in respect of it, but limited to the issue whether Mr Karim received the letter enclosing the Judgment, and referring to the time limit of 14 days for the application for a Reconsideration. The Employment Judge did not accept Mr Karim's evidence that he did not receive the letter. He records that Mr Karim was unable to give any explanation as to what prompted the writing and sending of the letter dated 22 November 2013 and the Judge found as a fact Mr Karim had taken no action to address the issue arising from the Judgment for at least six weeks after he had received it.

17. The Judgment then sets out the fact that there was discussion and submissions from Mrs Wilson about the nature of the discretion of the Tribunal to extend time. It records certain facts about Mr Karim, his ownership of a number of companies, that he was the managing partner of the Second Respondent and a director of the First Respondent. The Judgment includes an assessment of Mr Karim as an astute business person to be judged by that standard. It then comes to its conclusion about the delay in seeking Reconsideration and concludes that it was excessive. It discounted the subsequent delay which had arisen from the administrative error within the Tribunal's system and it decided to refuse the application for Reconsideration.

18. Mr Solomon informs me, and I wholly accept, that when Mrs Wilson was addressing the Employment Judge she addressed him not only on the question of the delay but on the

underlying legal merits of the Respondent's position, namely that they were a separate legal entity from the Limited company, which, it was acknowledged, had employed Mr Ul-Haq from the start until the end of his employment and that there was a sequence of events which resulted in any transfer of the business of the Limited company to the LLP not having occurred until 1 May 2013, by which time Mr Ul-Haq had long ceased to be an employee of the Limited company.

19. I accept that from Mr Solomon, but, in any event, it is clear that detailed submissions of that nature were made by Mrs Wilson because, as it happens, on the very day following the 7 May hearing there was a hearing, on 8 May, before the Leeds Tribunal, a panel comprising Employment Judge Wedderspoon and two lay members, in the case of Mr Mehmood against Ezi Floor Trading LLP and Ezi Floor Limited. That was, effectively, an application for Reconsideration by the Employment Tribunal of a prior decision to join Ezi Floor Trading LLP as a Respondent to proceedings brought by Mr Mehmood against them and Ezi Floor Limited in respect of his claimed unfair dismissal.

20. He too was employed by Ezi Floor Limited and his employment had terminated in December 2012. What had occurred was that LLP had been added to the proceedings as a Second Respondent and had been found liable by a decision made in August 2013. Mrs Wilson had sought to have the addition of LLP as a party to the proceedings reversed and succeeded in so doing. She had, in so persuading the Tribunal, set out a legal argument and a chronology which supported her submission to that Tribunal that Mr Mehmood had never been an employee of LLP. Ezi Floor Limited had, at the earliest, transferred to LLP the business of the Limited company on 1 May 2013.

21. The decision of Employment Judge Keevash on 7 May and the Written Reasons sent to the parties subsequently contain no hint of such an argument being put before Employment Judge Keevash by Mrs Wilson. Nor is there any indication that Employment Judge Keevash considered the merit of that argument and, therefore, the underlying merits of the contention that LLP could not be liable to Mr Ul-Haq for the claims he made of unfair dismissal, as he had never been an employee of theirs. It is clear from the authorities, to which I have been referred by Mr Solomon, that in considering an application for an extension of time for a reconsideration of Tribunal's decision, one of the factors to be taken into account in deciding whether to grant an extension of time is "the merits factor". That is a separate and additional matter to the question of the prejudice, respectively, to the parties of either granting the extension of time or refusing the extension of time. That principle is exemplified in the case of **Kwik Save Stores Limited v Swain** [1997] ICR 49, in particular at page 55, C to H.

Conclusion

22. In my judgment, Employment Judge Keevash, having had presented to him, I have no doubt, detailed and well-argued propositions and documentation, erred in law, in considering whether or not to grant an extension of time, by failing to consider the underlying merits of the position of LLP as revealed from, if no other place, the ET3 it had sent to the mistaken notice of claim issued on 17 January, and the submissions which, I find, Mrs Wilson would have made, similar to those she made the following day in the case of Mehmood. Plainly, therefore, the decision of the Employment Judge to refuse the application for reconsideration, because it was made outside the time limit, cannot stand. Mr Solomon has tried to persuade me that the case is such an obvious one that I should substitute a decision on reconsideration favourable to LLP, notwithstanding the fact that Mr Ul-Haq is not here and that the Limited company is not present.

23. In my judgment the underlying position is sufficiently opaque, and the procedural history sufficiently complicated, and the issue is one which, to some extent, depends on the position of Mr Karim, as to which he gave oral evidence before Employment Judge Keevash, that it would not be appropriate for this Tribunal to substitute a different decision on reconsideration to that of Employment Judge Keevash. In my judgment, his error of law means that the application for reconsideration, and an application for extension of time to do so, must be remitted to a different Employment Judge to determine the extension of time point and, if LLP is successful, then to reconsider the decision of the Employment Tribunal made on 3 October 2013. That is the order that I shall make.