Appeal No. UKEATPAS/0019/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HS

At the Tribunal
On 25 June 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

DR W SZEPIELOW — APPELLANT

NHS TAYSIDE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL FROM REGISTRAR'S ORDER
(WRITTEN SUBMISSIONS)

APPEARANCES

For the Appellant	Written submissions
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

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

An Appellant who was enjoying an extended holiday on a yacht in the Pacific filled in a Notice of Appeal which though it gave his home address, supplied only an email address in response to the pro forma request to supply a postal address for service. He did not comply with requests to provide such a postal address. An unless order was made, as a result of which his appeal was struck out, but it was subsequently reinstated by the Registrar, who then considered whether it had been properly instituted within the time limit for appealing of 42 days. She held it had not, because it did not provide a postal address for service, and rejected the appeal as being out of time. Held on appeal (determined in the Claimant's absence since he was on a further voyage) that he had actually provided a postal address, albeit not in response to the direct invitation in the pro forma to do so; that the rule requires only that the Notice be "*substantially*" in accordance with the form annexed to the Rules, and since the necessary information to satisfy the demands of policy had been given, and it was an address at which and through which the Claimant could be contacted, the Notice of Appeal was properly instituted, the appeal against the Registrar's Order should be allowed, and the Claimant's appeal against the Tribunal decision should now be considered on the sift in accordance with Rule 3.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This is an appeal against an order of the Registrar made on 26 March 2015. Given the history of this appeal, which I will recount, it is important at the outset to recognise that the reason that the Registrar thought an extension of time was necessary was that she considered that the appeal had not been properly instituted when it was submitted in March 2014.

2. The history unfortunately is complicated by a series of events, unfortunately following the Claimant's decision to take an extended holiday aboard a yacht. It appears he did so for therapeutic reasons.

The Procedural History

3. His claim initially came before Employment Judge Watt and members sitting at Dundee, who in a determination dated 4 February 2013 (actually it was 2014) dismissed his claims that he had been unfairly dismissed and subjected to discrimination on the grounds of sex, race and age.

4. On 10 March 2014 he appealed. In his Notice of Appeal he gave his name and set out an address with a postcode at Longforgan by Dundee. The **Rules** of the Employment Appeal Tribunal require, by Rule 3(1)(a), under the heading "Institution of appeal", that:

> **"(1) Every appeal to the Appeal Tribunal shall … be instituted by serving on the Tribunal the following documents -**
>
> > **(a) a notice of appeal in, or substantially in, accordance with Form 1, 1A or 2 in the Schedule to these rules; …"**

5. Form 1 was that applicable in the present circumstances. As scheduled to the **Rules** that provides, under paragraph 1, for the Appellant to state his name and address. Under paragraph 2, separately, is the request that "Any communication relating to this appeal may be sent to the appellant at" and then there is space for an address. It is specifically said to be an address for service and includes the telephone number if any.

6. The **Employment Tribunals Act** provides, by section 30(3), for the EAT to regulate its own procedure. It makes provision for there to be a **Practice Direction** issued by the President of the Appeal Tribunal and approved by the Lord Chancellor and the Senior President of Tribunals. Just such a **Practice Direction**, that of 29 July 2013, has been made. It repeats the need for the same form of Notice of Appeal as do the rules. In paragraph 3.1, under the heading "Institution of appeal: what should be in a Notice of Appeal" it reads:

> **"3.1. The Notice of Appeal must be, or be substantially, in accordance with Form 1 (in the amended form annexed to this Practice Direction) … Copies of the judgment, decision or order appealed against must be attached, as must be the Employment Tribunal's written reasons, together with a copy of the claim (ET1) and the response (ET3), or if not, a written explanation for the omission of the reasons, ET1 and ET3 must be given. *It must include a postal address at or through which the appellant can be contacted.* A Notice of Appeal without such documentation will not be validly presented." (Emphasis added)**

7. It will be seen, therefore, that in the present case the Appellant had given a postal address, which he says was his. When, however, he came to fill in his Notice of Appeal, under the paragraph which asked him to specify an address for service, he said simply this: "Email: szvovo@gmail.com". That was not, on the face of it, a postal address. Taking the view that there had been no proper compliance with Rule 3(1) and the understanding of that Rule conveyed by the **Practice Direction**, on 11 March Mr Brown, at the Edinburgh office of the EAT, asked the Claimant to confirm that his postal address for service was an email address.

8. On 12 March the Claimant responded. He told the Appeal Tribunal that he gave his email address deliberately because he would not be available at "my home address" and that he would appreciate all correspondence being sent electronically to his email address. That provoked a response from Mr Brown on behalf of the Registrar on 21 March, referring the Claimant to paragraph 3(1). He was told that he must supply a postal address for service within seven days. He did not do so. Instead on 24 March he responded, saying he was unable to give a postal address because he was currently on board a small private yacht on the Pacific Ocean. He anticipated a long cruise overseas and estimated that the:

> **"… time of my arrival back to my home address is 29 September 2014. Meantime I may be able to access my email box at ports of call."**

On 9 April the Registrar wrote, through Joanna Williamson at the Edinburgh office, to say that she did not accept:

> **"… that the Appellant has no abode and that he will be homeless when he returns to shore. The Appellant is to supply an address onland within 10 days."**

9. I would comment that this is a misinterpretation of that which the Claimant was saying. He had not said he was homeless. He had in fact confirmed his home address. He did not say he had no abode but rather he said where he was even though there could be no precision about that, given that he was in a yacht somewhere in the Pacific.

10. The on-land address requested by the EAT was not provided within the period of time required by the letter of 9 April, which was ten days. No address having been provided, an unless order was made on 5 June 2014. The order was in this form:

> **"A failure to provide an address for service means that this appeal is not properly instituted. The Appellant has failed to supply such an address despite being given an opportunity to do so. Unless the Appellant provides an address for service within 21 days this appeal shall be struck out under Rule 26. An extract of Rule 26 accompanies this direction."**

11. Rule 26 is headed "Default by parties". It provides, so far as material, that if any party fails to comply with an order or direction of the Appeal Tribunal, the Tribunal may order that he be debarred from taking any further part in the proceedings or may make such other order as it thinks just. By 26(3) it is also provided that:

> **"An appeal or answer, or part of an appeal … 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."**

Accordingly this order gave that opportunity

12. On 13 June the Claimant responded. The Claimant said he was not able to give a postal address at that time and repeated that he was on board the yacht. He gave the same time of arrival back to "my home address" but noted he might be able to access his email box at ports of call. He noted that he was not able to understand:

> **"… yours letter written in legal jargon particularly I am not able to find The Rule 26 as well as other quoted Regulations while I am over the ocean.**
>
> **I would be very grateful if you could be so kind to defer any action until I am back in home i.e. ETA 29th September 2014. …"**

He is not a natural English speaker.

13. The 21 days for compliance with the order of 5 June expired on 26 June. Therefore in law the claim was struck out on that date, assuming this to be an ordinary unless order. I do not entirely understand why the Registrar thought it necessary to include Rule 26 with the order because if any submissions were made, as they were, it would be necessary to consider them. Normally, where an unless order is made, it takes effect without the need for any further reference to the court (see the law as set out in the case of **Johnson v Oldham** [2013] EqLR 866).

14. On 23 July 2014 an order striking out the claim was made. I think this was probably entirely unnecessary. I think that it should not have occurred because, as I have observed, no further order was required. But it may have been that the Registrar thought she should consider the submissions which had been made in the interim by the Claimant, repeating his earlier correspondence and I am prepared to put that countenance upon it given what thereafter happened.

15. It appears that the Claimant returned, as he had said he would, to the address which he had put in the EAT Notice of Appeal, on 29 September. He confirmed that address as his address for service on 30 September. The next day the Scottish office of the EAT replied to inform him that his appeal had been struck out as the order of 23 July 2014 stated. The letter suggested that if the Claimant wished to proceed with the appeal, he should lodge an application for reinstatement. The Claimant put in such an application on 16 October. He said that he had given an email address because he had been on board a yacht and away from his home postal address.

16. The Registrar directed on 4 December that because the appeal had been struck out by virtue of the order of 23 July 2014 there was no procedure for reinstatement, commenting that:

> **"… The Appellant failed to appeal the strike-out order within the time limit. It was open to him to apply for an extension of time in which to do so."**

17. I do not accept this. It is implicit in any strike-out for non-compliance with an unless order that an Appellant is entitled to seek relief, and I would not wish the Rules of the Appeal Tribunal to be read so as to preclude that possibility. In my view the administrative response given by the officers in Scotland was correct and the then Registrar's view was erroneous.

18. However, the Claimant responded on 7 December by writing to me in a letter which was treated by the Registrar as an application for extension of time. She set out the history. She thought that the EAT staff had confused appeal and reinstatement, considering as she did that that the **Rules** permitted an appeal against a strike-out order but not an application for reinstatement. She thought that the simplest and most correct course was to follow the usual practice and to allow the appeal to be reinstated now that it was properly instituted, and then to determine the issue of an extension of time. It follows that by taking that approach the chapter of events from the time that a postal address was sought through to the unless order and the strike-out, and the view taken as to whether it required an appeal or an application to reinstate for its effect to be reversed, is irrelevant to the decision I have to make - save only for this, that it clearly indicated the view of the Appeal Tribunal through its officers as to that which amounted to the proper institution of the appeal.

19. Acting upon the basis that it was not until a postal address was supplied in October 2014 that the appeal had been properly instituted, the Registrar held that the claim was out of time. She was right to do so if that was a proper basis on which to proceed. That is because the **Rules** provide 42 days within which to appeal. An appeal must be an appeal which is properly instituted within that period of time subject only, if necessary, to the question of the payment of fees or remission. If the failure to provide an address as a postal address for service in the circumstances of this particular case amounted to a failure properly to institute an appeal, she was acting entirely consistently with other cases in holding that the appeal was out of time.

Lady Stacey's Order

20. The Appellant is again out of the jurisdiction. He has told the Appeal Tribunal that he does not intend to return until 7 December 2015. It was for that reason that Lady Stacey, after

setting out much of the history, directed by an order of 4 June 2015 that his appeal against the order refusing an extension of time be determined by an EAT Judge sitting alone on a date to be fixed. That date is today, 25 June 2015. She observed that, in the light of the protracted history of the appeal and the court's further administrative error in giving the Appellant incorrect procedural advice, it would arguably be open to the court to exercise its discretion under Rule 39(2) to order that the appeal should now proceed to a sift under Rule 3 on the papers already lodged. She commented:

> **"… I am not however persuaded that the particular error by EAT administrative staff in this instance and under the circumstances, while regrettable, has substantively prejudiced the conduct of the Appellant's case. Any delay in determining this appeal has in no small measure been caused by the Appellant's own conduct in failing to comply with the directions of the court.**
>
> **Accordingly the appeal will proceed as directed at paragraphs 6-8 of these reasons and the attached Order."**

21. The Appellant's case is simple. He argues that he did sufficiently supply an address for service. As I have observed, the Registrar's order proceeded upon the basis that that was not so. If I am satisfied that he did, this appeal should succeed. If not, it should fail.

Conclusion

22. I have come to the view that Rule 3 of the **Employment Appeal Tribunal Rules** contains an important qualification in Rule 3(1)(a). It provides not only for a Notice of Appeal in accordance with Form 1, but for one which is "substantially in" accordance. The case of this Claimant is unlike others in respect of which an appeal has been not held not properly instituted where there has been a failure to provide a postal address at all. Here on the face of the appeal form there was a clear postal address. That was given in the space asking for the Claimant's name and address. It was not, however, echoed in the box asking for an address for service. The reasons for that were explained.

23. I have to ask what the purpose is of requiring a postal address specifically for service. It seems to me that the need for a postal address has a number of policy reasons behind it. First, it must be possible for the Appeal Tribunal to be in contact with a party, for the Respondent to be in contact with a party, and for the party whose address is supplied not to be able to deny receipt under the usual postal rules. Secondly, it is obviously an important aspect of good administration. Without it, the Tribunal may lose grip upon the case, which it is important to maintain if the resources of the Tribunal are to be allocated properly and fairly as between cases, if dates are to be arranged for hearings, if the necessary documents are to be obtained from both parties and if the parties are to have the reasonable opportunity which all parties should have of communicating with one another to see if there can be any resolution of the appeal in advance. Thirdly, it is sadly not inconceivable that in some circumstances a party may be subject to an adverse order which has costs consequences. Without an address for service that may be difficult to enforce. Bailiffs (if appropriate) cannot be sent to email addresses. It is, therefore, necessary to the system of justice that that address should be supplied at the outset. I am satisfied, therefore, that there are good reasons for ensuring that a litigant supplies an address sufficient to satisfy all those particular requirements.

24. In the particular circumstances of this case, unusually, it seems to me, the Claimant having set out his home address, having confirmed in his early correspondence with the Tribunal when he was appropriately asked about the address that that was his "home address", and thereby giving an address which would satisfy the requirements of policy mentioned in the foregoing paragraph, there was substantial compliance with Form 1. The notice he completed satisfied it by containing the necessary information, albeit not precisely in the box which the form showed was to be preferred, and it satisfied the objectives which I have just explained. It will be rare that a case arises in which a party supplies an address, complete with postcode,

which they maintain is their home address but in which their Notice of Appeal is ruled out because they indicate some other and additional means of communication in the box where "service" is referred to.

25. In coming to a conclusion favourable to the Appellant in this particular case, I have borne in mind that he is not a natural English speaker. I think that his behaviour, having been challenged by the EAT and asked to supply an on-land postal address, was poor. The thrust of Lady Stacey's ruling was that he may have only himself to blame. If this case had depended upon the effect of the unless order, and if that had not been revoked by the Registrar in the course of the history which I have set out, he would have had no answer and his case would have stood struck out. Though made on a wrong premise, as I have held, the order would have been valid until set aside. As such it would have had effect. But today's hearing is purely in respect of the question of extension of time and I have come to the conclusion one was not needed because the appeal as originally provided was properly instituted. It was the unusual circumstance of the extended cruise which diverted attention from the substance of the procedure to an overemphasis on the formality required by the **Rules**. In my view this is an exceptional case. It is unlikely to set a precedent for any further case.

26. I have concluded in the particular circumstances that I should extend time upon the basis that I have set out. If it had been necessary to do so, I would have taken the Rule 39 approach too in the exercise of my discretion. I should add, however, that the Appellant thinks, so it appears from his correspondence, that his appeal will now proceed. It will proceed only so far as the **Rules** provide, which is to go for initial sift on the papers by a Judge. His Notice of Appeal is long and rambling and appears to argue much of fact whereas appeals lie on points of

law only. It may not be easy for his appeal to survive the sift, but it is proper that it should have that consideration.

27. For those reasons, this appeal is allowed. There will be a transcript. The Respondent has a particular interest in seeing whether this case has reached finality, and for that reason I would hope that the sift can be quickly considered.