Appeal No. UKEATPA/1502/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 June 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

TRAFALGAR CONSTRUCTION CORPORATION LTD — APPELLANT

MR C SINGH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL FROM REGISTRAR'S ORDER

APPEARANCES

For the Appellant	MS M G BENNETT (of Counsel) Quality Solicitors Martin Tolhurst 7 Wrotham Road Gravesend Kent DA11 OPD
For the Respondent	MS L CALDER (of Counsel) Kingsley Smith Solicitors LLP 81 High Street Chatham ME4 4EE

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. On 19 March 2014 the Registrar permitted an extension of time for an appeal which was out of time. The story begins on 29 August when Employment Judge Vowles signed off his Judgment against Trafalgar Construction in favour of Mr Singh, the Claimant. Trafalgar Construction had called no witness nor provided any document, nor been present or represented at the hearing at which that happened. On 10 September the Judgment was sent to the parties. 42 days later, that being 22 October, time expired for appealing. 42 days is a generous period compared with the period given in other circumstances to exercise rights of appeal. It gives time for a party to put its house in order for an appeal and gives full recognition to the fact that litigants may be representing themselves without immediate access to legal advice. It may recognise also that, within the period of 42 days, steps may need to be taken to ensure that the appeal is ready. The nature of some of those steps is indicated in a covering letter, headed "Employment Tribunal Judgment", which is sent to the parties and which was sent to Trafalgar Construction in the present case. That draws attention to a booklet called "The Judgment". It provides that if the disappointed party wishes to apply for a reconsideration of the Decision it must do so within 14 days. It sets out the time limit for the appeal. But then, importantly, for present purposes, in the third paragraph of what is a very short document it says this:

> **"The booklet also explains about asking for Written Reasons for the Judgment (if they are not included with the Judgment). These will almost always be necessary if you wish to appeal. You must apply for Reasons (if not included with the Judgment) within 14 days on which the Judgment was sent."**

2. The appeal by Trafalgar was submitted on the very last day that it could be if it were to be validly accepted. That was 22 October. It was, however, not properly instituted. That was because the **Rules of the Employment Appeal Tribunal 1993** (as amended) provide in Rule 3(1)(c) that an appeal from a Judgment of an Employment Tribunal must include a copy of

the written record of the Judgment of the Tribunal which is subject to appeal and the Written Reasons for the Judgment or an explanation as to why Written Reasons are not included. It is thus a matter of rule that either the Reasons or an explanation for their absence must be given. These points are emphasised in the **Practice Direction 2013** applicable to this appeal. That provides at paragraph 3.1 that the Notice of Appeal must have attached "copies of the Judgment, Decision or Order appealed against... as must be the Employment Tribunal's Written Reasons... or, if not, a written explanation for the omission of the Reasons must be given."

3. At paragraph 3.3, having dealt with a similar position in respect of any application for reconsideration, the need for a written explanation is re-emphasised, "If any of these documents cannot be included, a written explanation must be given."

4. At paragraph 3.4:

> **"Where written reasons of the Employment Tribunal are not attached to the Notice of Appeal, either (as set out in the written explanation) because a request for written reasons has been refused by the Employment Tribunal or for some other reason, an appellant must, when presenting the Notice of Appeal, apply in writing to the EAT to exercise its discretion to hear the appeal without written reasons or to exercise its power to request written reasons from the Employment Tribunal, setting out the full grounds of that application."**

5. The EAT Office, correctly, noticed that Trafalgar had supplied a copy of the Judgment but had not supplied a copy of the Written Reasons, in breach of the rule, in breach of the repeated guidance in the Practice Direction. There was no explanation why this was.

6. An explanation was first forthcoming on 4 November by e-mail, Trafalgar received a letter of 31 October from the Office, telling Trafalgar that the appeal had not been properly instituted. The second paragraph of that indicated that Trafalgar had applied "within the 42-day period for submissions but may have been out of time to request the written Judgment". That

does not coincide with a further document, dated 1 November, which appears to be the first record of any request having been made to the Tribunal for a copy of the Written Reasons of the Judgment.

7. When advised by the Office or a need to make an application for an extension of time and to set out the reason why the appeal had been submitted late, as it was, being some 13 days out of time, a letter of 9 January said that the lateness had been due to a number of incidents. The person monitoring and progressing this case was on compassionate leave at the time of the hearing and, on return, the initial 14-day period in which to request the Written Reasons had expired. Subsequent correspondence showed that she returned to the office on 18 September, in fact six days before the time limit expired for requesting Written Reasons. There was also no explanation why there was no-one else to attend to matters within the office since the Judgment was for a sum in excess of £13,000. It is doubly surprising.

8. The letter went on to explain that as the Judgment was a Default Judgment (that was an error, understandable perhaps since Trafalgar did not turn up to the hearing, but it was a considered Judgment taking into account the case which Trafalgar made on paper insofar as it went) and following the guidance on the website, Trafalgar believed they would have the opportunity to have the case reviewed. It expressed the view that the challenge made by the employer on the basis of its counterclaim would have succeeded.

9. It noted that there was an application for Written Reasons which was refused due to the time of the application. There is no document in support of that, nor any date of which I am aware other than 1 November.

10. When the solicitors acting for Mr Singh responded, Trafalgar wrote again to clarify some of what they had said. That material which Trafalgar put forward, therefore, in essence did not challenge certain important matters. It did not suggest that Trafalgar was unaware of the important time limits. It did not suggest that Trafalgar had not had access to the Practice Direction or the Rules; indeed the reference to guidance on the website would suggest that it did. It did not suggest that it thought that the Judgment of the Tribunal, although it was unusually full, contained the reasoning of the Tribunal for making that Judgment. There was thus an omission to put in the Notice of Appeal an explanation for the non-inclusion of Written Reasons, the need for which should have been appreciated and for which there was no good reason why it should not have been.

11. The form of the Notice of Appeal gave rise to some discussion in argument before me. The Notice of Appeal from the decision of the Employment Tribunal is a pro forma. Paragraph 5 specifies the copies of documents which should be attached. 5(a) reads: "the written record of the employment tribunal's judgment, decision or order and the written reasons of the employment tribunal", thereby drawing a clear distinction between the two. 5(d) asks for an explanation as to why any of these documents are not included, also to be attached. Here, (a), (b) and (c) are ticked. (d) is not. By contrast, in paragraph 6, the Notice reads in similar vein, asking for documents in respect of any review application. Thus it asks for copies of the review application, the judgment, the written reasons of the Employment Tribunal in respect of the review application and/or a statement by or on behalf of the appellant, if such be the case, that a judgment is awaited.

12. In handwriting, under 6(c), after the words "the written reasons of the employment tribunal in respect of that review application; and/or" there are the words "included in the Judgment". That is not a reference to the Decision under appeal. It is a reference to the refusal

to review. The reasons for the refusal to reconsider, as review is now known, were given in the document refusing to reconsider the case.

13. Mrs Calder for Trafalgar argues that this shows that Trafalgar were conscious of the need for Written Reasons, but thought them included in the Judgment. She argues that the form of this notice displays a degree of lack of familiarity with the procedure which is to be expected from effectively a litigant in person, albeit a company. Mrs Bennett for the Claimant, whose appeal this is, points to the absence of any such words in paragraph 5. There is simply, as she would submit, a recognition that the Judgment is distinct from the Written Reasons (it is there on the face of paragraph 6) and an absence of any explanation in paragraph 5 as to why the Written Reasons are not there included.

14. The second curiosity about the Notice of Appeal, in the light of the present issue between the parties, is that the grounds are expressed in two handwritten words in summary, "adequate reasons". Although there is some detail towards the end of that which is set out at Box 7, Trafalgar submitted that the Tribunal erred in law because it formulated the Judgment on the word only of the Claimant and did not give adequate reasons to support that decision, nor did they give adequate reason for rejecting the evidence enclosed by the Respondent.

15. It goes on to argue that the counterclaim was evidenced in the ET3 but not considered in the Judgment. It is therefore plain to see that the author of the Notice of Appeal turned his or her mind to the adequacy of reasons. That, of all things, should have alerted the Respondent to the need for adequate reasons and should have caused it to highlight the need to explain why those reasons were not put before the Appeal Tribunal in the Notice of Appeal. It gives rise to the question how the appeal could properly have been dealt with where the legal challenge was the inadequacy of reasons in a case in which the would-be appellant had taken no steps of which it had spoken to obtain any of those reasons though knowing they were deficient.

16. The Registrar, in her Judgment, set out accurately the authorities which concerned the extension of time for appealing, noting the particularly restrictive view which the Appeal Tribunal generally takes to such applications. She came to her conclusion that nonetheless time should be extended for reasons in the penultimate paragraph, that no Written Reasons in fact existed. And although it was the Appellant's duty to explain the situation and provide a reason for the absence of those reasons with the Notice of Appeal, "I reluctantly conclude that time should be extended as the situation is entirely artificial".

The appeal

17. Mrs Bennett, on behalf of Mr Charanjit Singh, argues that I should take a different course. An appeal against an order of a Registrar is different from an appeal to this Tribunal from an Employment Tribunal. I am not concerned with whether the Registrar erred in law. The jurisdiction is reconsideration and not review. It is open to me, indeed I am obliged, to take a fresh decision on the material before me. But Mrs Bennett argues that in **Kanapathiar v London Borough of Harrow** [2003] IRLR 571 the then President, Burton J, made it clear that the previous practice of taking a lenient approach and granting extensions of time where a Notice of Appeal, unaccompanied by extended Reasons, was put in within 42 days would now stop and that in future the same strict approach as had been approved by the Court of Appeal in **Aziz v Bethnal Green City Challenge Co Ltd** [2000] IRLR 111 CA would be adopted in respect of a Notice of Appeal which was not accompanied by the required documents within the 42 days as had previously been applied to other appeals.

18. He emphasised those points, which are clearly set out in the head note, in paragraphs 13 and 15. In paragraph 13 he observed that there had developed two classes of case, those in which a document or documents had been missing and those in which there had been a late

appeal *simpliciter*. The former had been previously regarded as a "lesser offence". He observed:

> **"...that will and must now stop. and certainly, since the new Practice Direction, there has been no application for an extension on that basis, and certainly none that has been granted; and this case, by the very Order which the Registrar has made, signals the end of any laxity in this regard. From that point of view it is useful that [Counsel for the Claimant]...brought the matter forward on appeal, so that I can deliver this judgment in open Court, and make the position entirely clear for the future.**
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> **...**
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> **15. In those circumstances, the appeal will be dismissed, but I take the opportunity of thanking [Counsel for the Respondent] for bringing this forward on appeal, and recognising that this gives an important occasion for this Tribunal to make the position entirely clear, namely that, in future, the same strict approach, approved in terms by the Court of Appeal in *Aziz*, will be adopted in respect of a Notice of Appeal which is not accompanied by the required documents within the forty-two days, as has previously been applied to a Notice of Appeal not lodged at all within forty-two days."**

19. Mrs Calder rightly points out that the wording here refers to documents. What is not specifically included is a statement of explanation why a document is missing. The principle being expressed, however, is in my view clear. An appeal, to be in time, must be instituted in accordance with the Rules and Practice Direction. If it is not, it is not properly instituted. There is no proper principled reason for treating an appeal, in respect of which any of the documents or text is missing, any differently from one which is simply late. That was made clear in **Kanapathiar**, as the Registrar herself observed in her decision in the present case. A practice Statement issued by Burton J in February 2005 said that, from the date of that statement:

> **"...ignorance or misunderstanding of the requirements as to service of the documents required to make a Notice of Appeal within the 42 days valid will not be accepted by the Registrar as an excuse."**

20. It is plain that by the word "documents" she was meaning any document required by the Rules or Practice Direction to be present. An explanation in writing as to why Written Reasons are not present is a document within that meaning. Accordingly, I accept that the starting point is that the appeal here has to be treated in the same way as if it were simply late. There can be no two classes, even if defined by a word such as "artificiality" where the artificiality is actually a requirement of the Rules. If it were otherwise, then litigants coming before this Tribunal

would be treated inconsistently. They are entitled to know what the position is as a matter of justice and legal certainty and for that position to be consistently applied. It is for that reason that, although the exercise of our discretion is sometimes seen to be harsh, it is necessary if fairness as between cases is properly to be done, which is, in my view, and in the view of the EAT generally, an essential part of justice.

21. Thus it is that those the exceptions which may exist, have to exist for good reason and will by their very nature be (exceptional although there is no separate test, as such, of exceptionality).

22. Here, therefore, I look to see what the explanation is for being late in putting in the Notice of Appeal. As set out in **United Arab Emirates v Abdelghafar and Anr** [1995] ICR 65, a decision which has been much approved since, the Tribunal must consider what the explanation is for the default, ask whether it provides a good excuse for the default and whether there are circumstances which justify the Tribunal taking the exceptional step of granting an extension of time (see page 72 C-D). In **Aziz v Bethnal Green City Challenge Co Ltd** it was emphasised that there had to be not just an honest and full explanation, but a good one. In addition, in concurring, Sir Christopher Staughton said at paragraph 23 that the merits would usually be of little weight, but if it was plain that the appeal had no prospect of success, that should be taken into account.

23. Following those principles and those from the other leading cases, which are **Jurkowska v Hlmad Ltd** [2008] ICR 841 and **Muschett v Hounslow LBC** [2009] ICR 424, I have looked for the reasons. What is significant to me here is that there is no plea on behalf of Trafalgar Construction that it was unaware of the time limits or the requirements of the Rules. I am satisfied it had an opportunity to ask for reasons and I am somewhat surprised it did not take

those up at an early stage given the extent of the liability against it. The application for reasons was only made after the appeal was put in. I take particular note against Trafalgar that the appeal itself argued the inadequacy of reasons. I take this into account for two particular purposes. First, it seems to leave somewhat surprisingly unexplained why the mind of someone responsible within Trafalgar was not directed to the need for reasons and the need to explain their absence before submitting the appeal. Secondly, and separately, when I come to consider the exercise of my discretion, I will take into account that it is very difficult indeed for an appeal, arguing that the reasons are inadequate, to succeed where there could have been reasons but there are not and where the absence of those reasons is down to the very person who wishes to take advantage of their absence.

24. The merits of the appeal are, I think, within the class that Sir Christopher Staughton identified. Nor is there any prejudice of any substance, though there is some, to Trafalgar in the sense that it is still open to Trafalgar, should it wish to do so, to bring county court proceedings since the claim is a purely contractual one and not restricted simply to the Employment Tribunal. I appreciate that is not ideal and it does involve some prejudice. I accept what Mrs Calder has said about that. But that is only marginal in weighing this in the balance.

25. I have not been invited to hear evidence. There was a document put before me, belatedly, having at one stage been objected to by the Appellant, but then subsequently advanced in reply and to some extent relied on. That is a written statement of 30 January 2014 from Ms. O'Keefe, who was apparently the responsible officer within Trafalgar for ensuring that this Employment Tribunal matter was dealt with. Mrs Calder did not wish to seek an adjournment so that she could be called, although submitting that, had she known that reliance was going to be placed on the statement, she would have called her.

26. I accept that, since the objection to the admission of the statement was taken by the Appellant before me, I should be cautious about accepting that which is in the statement or drawing inferences too readily which are contrary to Trafalgar's interests. However, what is clear to me from that statement is that, within the 42-day time limit, Miss O'Keefe was aware of the need to apply for Written Reasons within 14 days. I infer from that that she was perfectly capable, and at the time working in a position where she could have taken steps, to understand, if she did not, the need to give an explanation for the absence of the Written Reasons when the Notice of Appeal was submitted.

27. I am not satisfied that I have had a full explanation why Written Reasons were not present, even if it is rather difficult to add to the explanation that there simply are none. I do not think it is quite as simple as Mrs Bennett would have it, that Trafalgar are simply to be criticised for not making an application earlier than they did, and that in some way the explanation which should be sought is not for the failure to give a written explanation as to the absence of the Reasons but an explanation as to their failure to request the Reasons. They are two separate things. But they are linked.

28. In the event, I have come to the view that here although the breach might be said to be technical, it is a failure to put in an appeal on time. Applying the precedent of **Kanapathiar**, ensuring consistency with other cases, seeing that there is no good reason given for the absence of the necessary words in the Notice of Appeal, harsh though it might seem, the proper conclusion I should come to unless persuaded by some discretionary aspect is to allow the appeal against the Registrar's Decision and to refuse to extend time. In dealing with that discretion, I do not see anything which compels me to take a different course. There is much to persuade me that the course is right. I have mentioned the merits. The failure of the

Respondents to take the steps which might have been obvious does not assist. This is not one of those cases in which justice cries out for the extension of time, which it does in some. The Registrar was reluctant to extend time. I have rather less reluctance in refusing to do so, for the reasons I have given.

29. Finally I would like to thank both Counsel for their focussed submissions and their careful assistance through the relevant facts and authorities.

30. For those reasons the appeal is allowed, and the order of the Registrar set aside. The appeal is dismissed as being out of time.