Appeal No. UKEATPA/1598/13/BA
UKEATPA/0055/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 June 2014

Before

HIS HONOUR JUDGE JEREMY McMULLEN QC

(SITTING ALONE)

MR S MONFARED — APPELLANT

SPIRE HEALTH CARE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION – APPELLANT ONLY

APPEARANCES

For the Appellant	MR SIAMAK MONFARED (The Appellant in Person) with the help of MISS HEATHER PLATT (Appearing under the Employment Law Appeal Advice Scheme)

SUMMARY

PRACTICE AND PROCEDURE

Appellate jurisdiction/reasons/Burns-Barke

Case management

The Claimant's applications under Rule 3 raising interim appeals against tribunal orders were dismissed as the employment tribunal had subsequently struck out the entire claim. **Edem** applied. In any event on the merits there were no reasonable prospects and the then ongoing proceedings would be jeopardised.

HIS HONOUR JUDGE JEREMY McMULLEN QC

1. This case is about the ongoing cases before the Employment Tribunal of the Claimant, Mr Monfared, against his employer, Spire. The claims are complicated. They have been marshalled by Employment Judges in London and the papers come to me in a way which has been refined by Mr Monfared, who appears in person. He tells me he has had ample opportunity to discuss his appeals with Miss Heather Platt of Counsel, who has come today to provide her services under the aegis of ELAAS, and between them they have decided that Mr Monfared will put the case, but I have observed very helpful interventions to Mr Monfared by Miss Platt and she has assisted him in answering my questions. I am satisfied that the opportunity for legal representation has been made fully available to the Claimant.

Introduction

2. This is an interim appeal by the Claimant in those proceedings of the ongoing claims in the Employment Tribunal principally for race and religious discrimination, the Claimant being Iranian and a Muslim. There are claims of harassment and victimisation and other complicated claims. The Respondent, on receiving these claims, sought to strike out all or some of them.

The issues

3. The essential issues have not yet been determined, because on 6 January 2014 there was scheduled a hearing to take place between 3 and 19 September 2014 for 13 days, of the whole of the claim. This was a Judgment of Employment Judge DA Pearl at a case management meeting. It followed, first, a Judgment of Employment Judge Auerbach on 28 August 2013. At that, the Respondent was represented by Counsel, Mr Bourne. The application was to strike out certain parts of the claim. That failed. The Judge instead decided that two aspects had no

reasonable prospects of success. The Judge examined the points that were being made and came to a conclusion based on reasons which he set out in his Judgment at paragraphs 49 onwards. However, he had decided that the cases should attract a deposit order as having little reasonable prospect of success and ordered the deposit orders to be made in relatively small sums, £600 I think, in respect of the two aspects of the claims which were being made.

4. At the same time, the Claimant contended that the Respondent had made its response late to his second Employment Tribunal claim and that according to the rules the Respondent's Notice should have been struck out. Judge Auerbach decided that he would not deal with that, but would put it off to another hearing. That hearing took place on 10 October 2003 before Employment Judge Henderson where again the Claimant represented himself and the Respondent was represented by Counsel. The Claimant's claim had been struck out as a result of the mandatory provisions for he had not paid the deposit. However, having listened to the evidence of the Claimant, the Judge set aside the order made by Judge Auerbach and made her own order. The order was that the Claimant's application for relief was allowed. She made an order, a new order this time, in the same figures as had been ordered by Employment Judge Auerbach, and he complied with that.

5. At the same time, the Judge dealt with the application made by the Claimant first to Judge Auerbach and put off by him to Judge Henderson, that the Respondent's Response should be struck out as having been late; as to which, the Judge said the following:

> **"The Claimant's employment is continuing. On 3 June 2013 the Claimant issued the Second Claim. The Claimant informed the Respondent's solicitors that he was bringing a further claim. The Tribunal sent the ET1 to the Respondent's Head Office at 120 Holborn on 6 June 2013; the Response was due on 4 July 2013. On 5 August 2013 the Respondent's solicitors wrote to the Tribunal requesting sight of a copy of the ET1, which had not been received by their client. A copy of the ET1 was sent to the Respondent's solicitors on 15 August and the ET3 and Grounds of Resistance were sent to the Tribunal on 19 August together with a late application for an extension of time. A copy of this application and the ET3 was sent to the Claimant on the same date asking him to submit any objection to the application to the**

Tribunal in writing. The Claimant was unable to show the Tribunal any such objection. As a result the Respondent's application for an extension of time was allowed."

6. The case was then further consolidated, and other directions were made.

7. The matter came then before Judge Pearl, who made further orders for the onward progress of this case with the two aspects which had attracted the deposit order. In other words the whole case was going forward. I am told today, and it appears in writing, that on 4 June 2014 Employment Judge Lewzey struck out both of the Claimant's claims. I infer from what the Claimant has told me that it was for failure to comply with the orders of Employment Judge Pearl and perhaps other orders too. This appears in a bundle of 135 pages presented to me today. I will take at face value that the claims have been struck out and we are awaiting the reasons of Employment Judge Lewzey.

8. Things, therefore, have moved on. It is important to note that the Claimant appealed, let us say, against the refusal of Judge Pearl to stay the proceedings while the Claimant was appealing against the orders of, let us say, Judge Auerbach and Judge Henderson. I am cautious in depicting the appeals in that way because the papers are in some confusion, but some help can be obtained from two opinions given by Judges of this court in these two appeals. As to the first, on 24 February 2014 Supperstone J formed the following opinion under Rule 3:

"Once the 28 day time limit had expired, a tribunal had no power to entertain an application for an extension of time for presenting a response. However a decision by a tribunal not to accept a response because it had not been presented in time can be reviewed in accordance with Rule 34 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 where the interest of justice require such a review (see MUROAK t/a BLAKE ENVELOPES -v- CROMIE [2005] IRLR 535). That is in substance, if not in form, how the Tribunal proceeded. The Claimant was invited to submit any objection to the application for extension of time but was unable to do so (see para. 6 of the ET decision). The Notice of Appeal discloses no reasonable grounds for bringing the appeal."

9. As to the second Notice of Appeal, the matter came before Mitting J this time, and he formed this opinion:

> **"The Grounds of Appeal identify the judgment of the Employment Tribunal dated 6 January 2014 as that against which the claimant is appealing. The Grounds of Appeal do not refer to any decision made at that Preliminary Hearing, but appear to relate to a decision which was made at an earlier hearing to extend the time given to the respondent to file its response. That decision was made on 10 October 2013 and the reasons for it sent to the parties on 17 October 2013. It has already been the subject of an appeal by the claimant. Supperstone J has already made an order under Rule 3(7) in respect of it. The claimant cannot reiterate his challenge to that decision in this appeal. His Grounds of Appeal set out no basis upon which the ordinary and sensible directions made by Judge Pearl for the hearing of his claim in September 2014 could be disturbed on appeal. I direct that no further action is taken on the Notice of Appeal because it discloses no reasonable grounds for bringing the appeal."**

10. That gives us some background. There is also an inference as to the Claimant's other Employment Tribunal proceedings. As he told me, he had appeared before HHJ Peter Clark on 26 June 2013 in appeal PA/1477/12/BA, **Monfared v The Chartered Society of Physiotherapy**. In that, Judge Clark rejected the application, as it had been rejected on the sift by another EAT Judge. Part of the appeal included a complaint that, in that separate case, although the Claimant says it is linked because he fell out with his trade union, counsel for the trade union had produced a Skeleton Argument and had not given the Claimant enough time. As to which, Judge Clark did not regard the matter as material. He also pointed out the difficulty facing a Claimant in trying to overturn a Tribunal case on the basis of perversity (see paragraph 7 of Judge Clark's Judgment).

11. I understand that the Claimant has taken this matter to the Court of Appeal. Although the record is not entirely clear, it appears that there was an oral hearing for permission to appeal before three Lords Justices on 24 February 2014 when Judgment was reserved, and it has apparently not been received by the Claimant. [The judgment **EWCA Civ 828** was issued on 19 June 2014 and should be read with this which I read before approving this judgment.]

12. So, as it can be seen, two Judges of this court in respect of the two applications before me have given very firm opinions that the appeal has no reasonable prospect of success. Notwithstanding those very firm views, I have formed my own, independently, in accordance with the practice I described in **Haritaki v SEEDA** [2008] IRLR 945, paragraphs 1-13, and **Evans v University of Oxford** [2010] EWCA Civ 543, approving my approach.

The legislation

13. Although in his Skeleton Argument submitted before today the Claimant raises a number of legal principles and legal instruments, and in his Skeleton Argument for today cites many more, what I am concerned with is the **Employment Tribunals Rules**, which give a Judge in the Employment Tribunal power to regulate the proceedings and to make sure that cases are fit to be tried and to issue orders in that way.

Discussion of the Claimant's case

14. Having read all of the papers which were put before me before today, and having had a brief look at the 130-odd pages submitted just before court, Mr Monfared agrees that there are four points. The first is that he wants an adjournment of today's case so that he can appeal against Judge Lewzey's order striking out the whole of the cases, and that these two cases before me be joined to this putative appeal and be heard altogether. I will deal with that first.

15. The EAT does have power to adjourn. There may be some force in the Claimant's argument that he wants all matters heard together. However, time in the EAT is precious. I have read the papers and I have heard Mr Monfared's argument in respect of the Rule 3 applications, so that it informs my decision on whether I should grant an adjournment. I have decided, in the light of what he has submitted to me about the merits of the two applications

before me, that it is not in the interests of justice or in accordance with the overriding objective to adjourn these two matters any further, and so I will now deal with them on the merits.

16. The first is that the Respondent put in a late ET3. Having gone carefully through the paragraph in Judge Henderson's decision cited above, the Claimant was most generous when I put to him that in fact the Respondent was not in the wrong. As he engagingly told me, "You have a really good point, and it has been well covered". That is a gracious way for the Claimant to put it. As a matter of chronology, the Respondent was not obliged, if it did not receive the ET1, to respond to it. The Tribunal may well have sent it to Head Office. But, as I read that paragraph, the Judge has made findings that the Respondent did not get it. So there was no obligation until it did receive it. And when it did receive it, it responded within four days. So that is a simple answer to this appeal which I dismiss.

17. If I am wrong about my interpretation of the Judge's findings, it was within her discretion to allow a further few days for the Respondent's Answer in the light of what she was told. The Claimant contended that this was simply paying back the Respondent since the Judge had already given permission to the Claimant. I do not accept that for one moment. The Judge judged each of the two applications before her on its merits. It will be recalled that in the first the Claimant himself was at fault. But he showed that he had not received a relevant document and the Judge accepted that. The Claimant told me today that there seems to be such confusion in the Tribunal system. It is quite possible for the Employment Tribunal to send the document and equally possible for it not to be received. That is what happened here. So that is an answer to the technical point raised by the Claimant, that the Respondent should be refused its right to defend the second claim. I dismiss this ground.

18. As part of that, and very late in his argument, the Claimant contended that Employment Judge Pearl was perverse in the orders that he made. The Claimant should know, it having been pointed out to him, as I have said, by Judge Peter Clark that this is a high hurdle to surpass. Not only is there a perversity difficulty, but we are dealing with case management orders by a Tribunal in a complicated discrimination claim, which needs to be rationalised and marshalled. I bear in mind what Judge Henderson said to the Claimant in paragraphs 11 and 12 of her Judgment, in which she carefully explained to the Claimant that he must make points clearly and that he himself is confused. There is no ground for saying that Judge Pearl's orders were perverse.

19. The next ground was that Judge Pearl, on 6 January, should have adjourned because there was an EAT appeal on foot. It will be recalled at that stage that the matter had not even gone before either of Supperstone J and Mitting J. The matter was still waiting for attention on the sift.

20. In my judgment there was no reason for Judge Pearl, on the say-so of the Claimant, to adjourn all further proceedings in this case awaiting the outcome of the Claimant's appeal against the orders of, let us say, Judge Auerbach and Judge Henderson.

21. The worst that can be said is that the Claimant resisted the deposit orders, but they were only a small part of the case. They were actually going ahead, as was the bulk of the case, and it was in the Claimant's interest – I point this out firmly – for case management orders to be made so that his claim could be heard. As a Judge has already noted, this is an old case. There are allegations going back to 2009/2010. So it was in his interest that the orders are made. He says he was bombarded with orders with Judge Pearl, and he says that Judge Pearl is a hard

man. I myself have been an Employment Judge and I know the pressures. But these days it is very important that cases of discrimination lasting 13 days are properly marshalled. I can see no objection to Judge Pearl cracking on with that, even though the Claimant had told him he had submitted appeals against Judges' orders earlier on. The fact of the appeal cannot have affected the ongoing pursuit of this case, and the Employment Tribunal is to be complimented on the arrangement it made for all documents and evidence to be produced long in advance of the 13-day hearing.

22. During the 50 minutes which the Claimant addressed me, he repeatedly pointed out he was not a lawyer. I accept that. Most people who come here in their own cases are not lawyers. Many people are litigants in person, opposed by, as he puts it in this case, very distinguished Counsel, including Mr O'Dempsey, who he points out wrote the standard work on the subject. But it is not unfair for a party facing an extended claim such as this to seek to get the best representation and to pay for it. It is not an inequality of arms that is recognised in the law. The Claimant in an Employment Tribunal will be facing a Bench experienced in dealing with a litigant in person and indeed that was the case here.

23. But, as an adjunct to this submission, the Claimant told me he was inexperienced. I do not accept that. I have already pointed out that he appeared in the case against the Society of Physiotherapy and has so far persevered in taking the case to the Court of Appeal. He has been told on many occasions how he must put his applications and how he must make applications clear (see, for example, Judge Henderson and case managers in this court). I have risen above the difficulties in the paperwork here and tried to get to the heart of it. I know the Claimant has done the best he can to present the issues which seem to me to be important. He also tells me he is in litigation against his employers for a personal injury claim, which has been

struck out with costs, in Central London County Court. So the Claimant is a person who is familiar with legal matters. See, for example, the extensive citation of authorities in his bundle submitted to me this morning. I bear in mind, however, that litigants in person are not the best people to stand back objectively and look at the merits and that they are under stress in appearing. But Mr Monfared has, as he did before Judge Clark and Judge Clark noted, presented his case with courtesy and with measure today.

24. I hope I have explained to him why this claim fails. First, there is no point in my hearing these two claims when the claim has been struck out. That is my primary reasoning in this case. There simply is no case to try, it having been struck out. I refer to a Judgment in this court I gave in **Edem v. Egg Plc & Anor** [2007] UKEAT 1600_06_2606 which makes the point. It was approved by the Court of Appeal.

> **"On 24 January 2007 I indicated to the Claimant that I would take a holistic approach to his cases. He welcomed it. This would mean consideration of the first, second, third and, what became the fourth, Notices of Appeal. My concern was that, if the claim had been struck out, there would be no point in considering the interim appeals unless it could be said that errors had occurred which were replicated in the strike-out judgment. That approach did not subsequently commend itself to the Claimant for he sought permission directly from the Court of Appeal to appeal against it. Permission was refused. A renewed application was made before Rix LJ on 30 March 2007 [2007] EWCA Civ 394. He refused permission, commending my approach as sensible case management in a complex situation. … The judgment of Rix LJ is essential reading for an understanding of a number of today's proceedings."**

25. But, in fairness to Mr Monfared, who has been involved in this litigation a long time, I have looked at the merits of the two cases that he brings, and there is nothing in them. There is no reasonable prospect of success. I also take the view, as was done by the two previous Judges of this case, that this is going over old ground. It may be that, if the Respondent were here, they would point out what Judgments are attacked and whether or not they have already been the subject of previous orders. But it seems to me that the Claimant is seeking to go back on orders previously made in this court, and that would be an abuse of the process, which is also a reason for rejecting this claim under Rule 3.

26. If I were dealing with the applications on their merits and not on the basis that I have previously decided that I should not, I would also take the view that these appeals will interfere with proceedings which are ongoing, which is another limb of Rule 3 upon which I also decide. For, as it appeared to me when I read the papers, this case was properly organised to go ahead for 13 days in September and I would not like to see this old case made even more old by orders made in this court.

27. So, on the merits, I would dismiss the applications for the three reasons I have given under Rule 3. And, on the procedure, I would dismiss the case because it has been struck out at the Employment Tribunal. If this strike-out results in an appeal to this court and results in a Full Hearing of the matter, there will be no need to go back on the two appeals before me today, because the court will there have my orders and will not need to determine them.

28. I want to thank Mr Monfared and Miss Platt for the help which they have given me today. These applications are dismissed.