Appeal No. UKEATS/0051/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 12 March 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR ANDREW BEALE AND 3 OTHERS — APPELLANT

(1) CLYDESDALE BANK PLC
(2) NATIONAL AUSTRALIA GROUP EUROPE LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS IJEOMA OMAMBALA (of Counsel)
For the Respondents	MS GAIL HAWTHORNE (Advocate) Instructed by: Dundas & Wilson CS LLP Saltire Court 20 Castle Terrace Edinburgh EH1 2EN

SUMMARY

Age discrimination; time limit for application under section 123 Equality Act 2010.

The claimants wished to bring claims of age discrimination under the Equality Act 2010 in relation to the payments made to them at cessation of their employment. They had sought advice from their Trade Union and had entrusted the Trade Union to make any applications necessary to pursue their claims. No applications were made within the three month time limit prescribed by section 123 of the Equality Act 2010. The claimant then made applications to have the time extended. The ET refused. Held: the ET was entitled in all the circumstances to refuse. There was no error of law. Appeal dismissed.

THE HONOURABLE LADY STACEY

Introduction

1. This is an appeal by the Claimants from a decision of an Employment Judge, Ms McManus, sitting alone in Glasgow, sent to parties on 9 July 2013. Ms Omambala appeared for the Claimants both at the Employment Tribunal and before me. For the Respondents Ms Sangster, Solicitor, appeared in the Employment Tribunal and before me Ms Hawthorne, Advocate, appeared. The decision of the Employment Tribunal is to the following effect:-

> **"It is not just and equitable for the Tribunal to exercise its discretion to extend the time limit for lodging these claims and each claimant's claim of age discrimination is dismissed."**

2. The underlying case is about age discrimination as it applied to the ending of employment and severance pay. There is no dispute about the facts found by the Employment Judge and therefore I do not require to quote extensively from these facts. The position is that the Claimants asserted that they had been paid less on leaving their employment than others due to their age. They took the matter up with their union. No application was made to an Employment Tribunal on their behalf.

The law

3. Ms Omambala helpfully outlined the statutory provisions to the effect that the **Equality Act 2010** is the relevant statute, that section 13 of that Act provides that age is a protected characteristic, and therefore one on which a claim of discrimination could be made, although she notes accurately that it may be met with an objective justification defence. She asks me to note that Part 5 of the **Equality Act 2010** deals with work. The jurisdiction of the Employment Tribunal to deal with such a matter is set out in section 120 of that Act and is in the following terms:-

"Jurisdiction

An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);

(b) a contravention of section 108, 111 or 112 that relates to Part 5."

4. Proceedings in civil courts under the Act are dealt with in section 114, which is in the following terms:

114 Jurisdiction

(1) A county court or, in Scotland, the sheriff has jurisdiction to determine a claim relating to—

(a) a contravention of Part 3 (services and public functions);

(b) a contravention of Part 4 (premises);

(c) a contravention of Part 6 (education);

(d) a contravention of Part 7 (associations);

(e) a contravention of section 108, 111 or 112 that relates to Part 3, 4, 6 or 7."

5. As Ms Omambala correctly pointed out, the latter section does not, on the face of it, deal with work, which is dealt with in the first section I have quoted above, and in which the Employment Tribunal has jurisdiction.

6. The time limit for bringing a case to the Employment Tribunal is set out in section 123, which is in the following terms:-

"123 Time limits

(1) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates or

(b) such other period as the employment tribunal thinks just and equitable."

7. Section 118 makes provision for time limit in the Sheriff Court. The time limit given there is six months, and there is an provision identical to that in relation to Employment Tribunals, as regards the court regarding another period as just and equitable.

The Employment Tribunal decision

8. Therefore, it being agreed that the four Claimants did not lodge claims with the Employment Tribunal within three months, the reasons why not were set out by the Employment Judge at page 12 and paragraph 6 (cc) as follows:

> **"The reason for the delay in all four claimants' claims being lodged with the Employment Tribunal is that all four claimants left the matter with his trade union to deal with. They were all not then advised or were otherwise aware of any time limits for raising proceedings in relation to this matter.** [Ms Omambala wonders if there is a typing error, but it is not in dispute between the parties that the Claimants were not aware that there was a time limit] **All four claimants individually put their trust in Unite the Union to take any appropriate action on his behalf in order to protect his position with regard to this matter. In these circumstances they each did not consider it appropriate for them to take any steps to raise action independently."**

9. I should say at this stage that the Employment Judge found that the four Claimants were not personally to blame. She found it was entirely reasonable for them to have put their trust in the union.

10. The Employment Judge went on to narrate the submissions made to her, and in paragraph 21 of her Reasons she quotes a part of the submissions made on behalf of the Claimants in the following terms:-

> **"It is in line with the overriding objective of the Tribunal for these claims to be allowed, although late, and entirely proper for the Tribunal to exercise its discretion in these circumstances and to permit the claims to proceed. If the claims are not permitted to proceed before the Employment Tribunal, the claimants could pursue this matter in the Sheriff Court or County Court against these respondents. This would be in respect of the enforcement of the implied equality clause in the claimants' contractual entitlement to their pensions. Such claims would be against these same respondents in respect of this same age discrimination matter, but that would be satellite litigation which should be avoided. The Employment Tribunal is the well-established jurisdiction to deal with claims of this kind and the claims should be permitted to proceed in this proper jurisdiction."**

11. Ms Omambala has clarified for me today is that her position before the Employment Tribunal was that the Sheriff Court was the only other remedy she could think of, but it was not her main position. In my view, paragraph 21 states that the submission made before the Employment Judge was to that effect, that there was a matter which could go before the Sheriff Court, but the Employment Judge appreciated that counsel did not regard that as her main position.

12. The Respondents are noted by the Employment Judge as submitting that the time should not be extended. It was argued that the passage of time would have dulled the memory of witnesses. Further, in paragraph 30 of her Reasons the Employment Judge notes the following as a submission made by the Respondents:-

> **"The claimants were paid in accordance with the contract and there is no outstanding breach of contract claim on which civil proceedings could be raised."**

13. Having noted the submissions made to her, the Employment Judge correctly directed herself that the relevant law is set out in the Equality Act 2010 and she quoted that in paragraph 31 of her Reasons. In the section of her Reasons immediately below that, headed "Discussion and Decision", she set out what she found significant and gave her reason for coming to her Decision. It is not disputed before me that the Employment Judge appreciated that the test was whether it was just and equitable to allow an extension. Similarly, it is not disputed before me that, in order to make such a decision, the Employment Judge was required to weigh up all that had been put before her and to exercise her discretion. She had found that no blame attached to the four Claimants, as she found it was "entirely reasonable" for them to have entrusted their trade union to advise them and to take necessary action on their behalf.

14. At paragraph 36 of her Reasons the Employment Judge referred to the case of **Virdi v Commissioner of Police** [2007] IRLR 24 and in that paragraph she noted that, if there is in existence a potential case against a legal adviser, that is a factor which should be taken into account. She accepted, however, that it was not decisive. It was simply something that had to go into the scale and be weighed along with everything else.

15. The Employment Judge plainly equiparated the union with a solicitor in that she had found that it was reasonable for the Claimants to entrust not only the provision of advice but also the taking of action to the union, and it is not in dispute before me that the union, for whatever reason, failed to take action in time.

16. Continuing then with the Employment Judge's decision making and reasoning for it, at paragraph 37 to paragraph 40, I have found the nub of her decision, and it is necessary to quote these paragraphs as follows:

> **"37. If, as submitted by the claimant's representative, claims can be raised by the claimants against these respondents in another jurisdiction i.e. the Sheriff Courts or County Court then this is a factor against the discretion being applied. The Employment Tribunal time limits should be applied strictly, and if there is another forum in which the claims can be pursued against these same respondents, then that is a factor in consideration of the prejudice which both parties would suffer should be the Tribunal's discretion not be applied. It was the claimants' representatives' clear position, on which she was questioned by the Tribunal, that these claimants would retain a remedy against these same respondents in respect of this matter, should these claims not be allowed to proceed through the Tribunal process. The Tribunal considered that to be a highly relevant factor in its consideration of the application of its discretion.**
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> **38. The Tribunal was not satisfied on the evidence before it that there would be any significant difference to the cogency of the evidence on the issues should these claims be allowed to proceed, although late. There was no evidence before the Tribunal that the relevant personnel would no longer be available to the respondents, nor that there may be further claims on this issue still to crystallise against the respondents (although the Tribunal did not attach any weight to that latter submission). It was accepted that there are other claims against these respondents on this same issue which were submitted in time and are being pursued before the Employment Tribunal. A fair trial on the issues is still possible.**
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> **39.The Tribunal was careful to bear in mind its overriding objective and was mindful that in *Virdi* (at paragraph 43) LJ Elias found that that was an exceptional case, where he was confident that a Tribunal properly approaching the issue would be obliged to conclude that the only factor weighing against the extension of time was the availability of the legal action against the solicitor, but that that on its own was not the legitimate reason for refusing to extend time, as it would simply give the respondent a windfall at the expense of the solicitors. The Tribunal was careful to consider all the circumstances, and the submissions by both parties' representatives.**

40. The Tribunal considered whether in all the circumstances of each of these claims it was just and equitable to extend the time for each claim to be lodged. In the circumstances of these cases, it cannot be concluded that the only factor weighing against the extension of time is the availability of a legal action against the Trade Union. The claimants' representative's clear position, on which she was questioned by the Tribunal, was that if these claims were not permitted to proceed before the Employment Tribunal, the claimants could pursue the matter in the Sheriff Court or County Court against these same respondents. The claimants' representative was clear that such claims would be against these same respondents in respect of this same age discrimination matter. The Tribunal does not agree with the claimants' representative's position that such action would be 'satellite litigation'. The availability of remedy on this issue against the same parties in an alternative jurisdiction is a factor against there being prejudice to the claimants should the claims not be allowed to proceed, and is also a factor against the respondents enjoying a windfall should the discretion not be applied. In all the circumstances the Tribunal considers that it is not just and equitable for these claims to be allowed to proceed, having been lodged outwith the three month time limit. All four claims are dismissed and may not be pursued through the jurisdiction of the Employment Tribunal."

17. It has been necessary for me to quote the last four paragraphs to show that the Employment Judge noted carefully all that had been put before her. I should say that the Respondents' position, as noted at paragraph 30, is what I am concerned with today, as it was before the Employment Judge. Counsel for the respondent today stated that there may be a cause of action in the Sheriff Court, which is a change of position, to which Ms Omambala drew my attention. Therefore I should make it plain that what I am concerned with is what was before the Employment Judge, and I take no account of any attempt by the Respondents to change that position today.

The Claimants' case

18. Ms Omambala argued that there had been an error of law because the Employment Judge had used the word "remedy" to describe the situation pertaining between the Claimants and the Respondents in the Sheriff Court. She argued that I should construe the Employment Judge as deciding that there would be jurisdiction in the Sheriff Court, both in the sense of there being a right to bring the action in that court and also there being no time-bar difficulty, and that she had also decided there would be no difficulty in liability. She argued that the Employment Judge had gone too far in so deciding, and that she should have investigated further the existence of the claim especially when the Respondents had disputed it before her.

Ms Omambala argued that it was for the Employment Judge to take matters further, when it was plain before the EJ that counsel for the claimants was saying that there may be such potential claim and the solicitor for the Respondents was saying that no such claim existed. She argued that the Employment Judge had erred in law by using the word "remedy", which she said indicated that the Employment Judge had decided that there would be a successful claim in the Sheriff Court. Ms Omambala accepted from the case of **Robertson v Bexley Community Centre** [2003] IRLR 434, that the correct position with an application for an extension, which is what she made before the Employment Judge, is that there is no presumption of its being granted. It is well-known that employment law time limits are adhered to strictly, and she recognised that. She did, however, argue from the case of **Virdi** referred to above that the Claimant should not be prevented from bringing a case before the Employment Tribunal where it was a fault on the part of their solicitors, and that was the only thing that was against them. She noted, of course, that the Employment Judge had found various matters which would be in favour of granting an extension, all as set out in paragraph 38, which is quoted above. In so doing, she drew my attention to paragraphs 35 and 36 of the Employment Judge's reasoning, which it is probably not necessary for me to quote but which state that the reason that the claims are late is that the trade union did not advise or take action on behalf of the Claimants: and that, where there is in existence a potential claim against a legal adviser, for which as I have already said one can read trade union in this situation, is simply a factor to be taken into account.

19. Ms Hawthorne argued that the Employment Judge had applied the correct test to the material before her. She made reference to the **County Council of Hereford and Worcester v Neale** [1986] IRLR 168 on the basis that the decision the Employment Judge had made was within a reasonable band of decisions, if I understood her correctly. In my opinion, that is not actually relevant to this case because I am concerned with the exercise of discretion. Ms Hawthorne made reference to the

Employment Judge's narration of the situation as it was submitted to her by counsel for the Claimants at the Employment Tribunal: that is, as set out in paragraph 21 of the Reasons, that there could be an action in the Sheriff Court.

Conclusions

20. My decision is that there is no error of law here. The Employment Judge proceeded on the basis of what was put before her. She was entitled, in my opinion, to accept what she was told by counsel for the Claimants, that there was the possibility of claims in the Sheriff Court or, come to that, in the county court. I do not accept that the judgment shows that she thought that there was a "definite win", in the Sheriff Court. Ms Omambala, of course, does not use the words "definite win" but she does submit that the Employment Judge has, by using the word "remedy", apparently taken the view that there is something more than a potential claim. I disagree with her. It seems to me that the Employment Judge has simply narrated what she was told, which was, effectively, that there might be a possibility of a claim in the Sheriff Court. It does seem to me that the Employment Judge has taken a rather sceptical view of that because, at paragraph 37, which is quoted above, she has narrated that it was the Claimants' clear position and that the Employment Judge herself questioned counsel about it. It seems to me that she did quite enough by doing that. There was no need, nor indeed any way, in which she could investigate matters further. I, of course, express no view as to whether there is any claim in the Sheriff Court or whether there is any claim against the union either. I am simply concerned to look at what was before the Employment Judge and it seems to me clear that what was before her was that there was a possibility of a claim in the Sheriff Court on the basis of breach of contract and that there was a possibility of a claim against the union, presumably in delict for failure to carry out the duties that would have been expected of them.

21. But of course that matter is not before me. All I say is that the Employment Judge heard perfectly cogent, I am sure, submissions from responsible counsel and a responsible solicitor who appeared below, and she was entitled to take them into account in making her decision. Having done that, she set out carefully all that was before her. She gave her reasoning from paragraph 33 onwards, and it seems to me that she has done all that can be expected of her. This is a matter which was for her discretion, and it is in the context of extending a time limit in an Employment Tribunal where it is agreed by all that that is not done routinely. It is only done in circumstances which lead to the EJ finding it just and equitable to do so. It seems to me that the Employment Judge was well aware of that and that she made a decision with which I would have no basis at all to interfere.

22. Therefore I must dismiss this appeal.