Appeal No. UKEATPA/0896/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 March 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR B FARMER APPELLANT

(1) HEART OF BIRMINGHAM TEACHING PRIMARY CARE TRUST
(2) BIRMINGHAM CITY COUNCIL
(3) SECRETARY OF STATE FOR HEALTH RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEAL FROM REGISTRAR'S ORDER

APPEARANCES

For the Appellant	MR ALLAN ROBERTS (of Counsel) Instructed by: Gordon Lutton Solicitors Wyevale Business Park Wyevale Way Kings Acre Hereford HR4 7BS
For the First and Third Respondents	MR TARIQ SADIQ (of Counsel) Instructed by: Treasury Solicitor's Department One Kemble Street London WC2B 4TS
For the Second Respondent	MR JONATHAN MEICHEN (of Counsel) Instructed by: Birmingham City Council Legal and Democratic Services PO Box 15591 Birmingham West Midlands B2 2UP

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. On 6 November 2014 the Registrar exercised her discretion to extend time in this appeal. She needed to do so by only ten minutes. The Respondents appeal against that decision. An appeal from a Registrar's order, unlike appeals from Employment Judges, does not depend upon the identification on appeal of a point of law. The discretion is to be exercised entirely afresh by the Judge before whom the case comes. Accordingly, though paying appropriate respect to the reasons which the Registrar gave, I exercise my discretion entirely afresh in the light of the authorities applied to the very particular facts of this case.

The Facts

2. The Judgment from which appeal is sought was made for reasons which were sent to the parties on 30 July 2014. The time limit under the EAT Rules is a generous one of 42 days. Time expired on 10 September 2014. It expires at 4pm on the last day. If an appeal has not been received or has only incompletely been received before 4pm on the last day, it is out of time. It is common knowledge to employment practitioners that, even if an application to appeal has almost finished coming off the fax machine or through the email system, it will not have been received in time if some part of it comes after the deadline.

3. The chronology is instructive. The letter containing the Written Reasons would probably have reached the solicitors acting for the Claimant by 4 August. It went to their Hereford office. The solicitors had recently opened an office at Worcester. It was in the process of being established. Accordingly, post was not sent to it, though it was where the employment team, consisting of solicitor and paralegal, resided.

4. The solicitor, Helen Moore, did not pick the Written Reasons up until 15 August. This was a failing, in my judgment, on the part of the systems of the solicitor. What had happened was that systems had been put in place for post to be delivered from Hereford to Worcester. That was by scanning. Hard copy post would be collected by Ms Moore when she visited the Hereford office. The Written Reasons were of such length, being 33 pages long, that they were thought to be too bulky and big to scan through. They were apparently put to one side. It was not, therefore, until ten days or so after they had arrived that they were first picked up and considered by Ms Moore. That failing is a failure of system. It is both unfortunate and regrettable.

5. On 15 August, however, the Written Reasons were sent to counsel who had appeared for the Claimant at the Tribunal. By 18 August he had expressed his views, not necessarily in writing, that it would be worthwhile obtaining his opinion. That was required since the Claimant was insured. The insurer had to approve the costs of representation at appeal level. That then necessitated a quote being obtained from counsel's clerk. That was sought the next day, on the 19th. The day after that, the 20th, the quote was emailed to the insurer, and two days later, the 22nd, that was approved. The papers then came back to counsel for him to write his opinion.

6. One of the several unfortunate circumstances of this case then delayed matters a little. Counsel was ill. Though he attempted to deal with some parts of the case during his illness, he did not succeed in delivering his opinion until 5 September. That was, in my judgment, on the information before me, the first reasonable opportunity he had, given his illness, and although Mr Sadiq for the First and Third Respondents, supported by Mr Meichen for the Second Respondent, argue that it might have been possible to instruct alternative counsel during that

period, I reject that submission. It seems to me, realistically, it would have taken about as long, and the replacement would have suffered from the disadvantage of not being au fait with the finer points of the hearing before the Tribunal.

7. The opinion was immediately sent on 5 September to both the Claimant and to the insurer. By 8 September the insurer gave approval for the appeal to proceed. By now there were two days at the most of the available time limit left.

8. Counsel drafted Grounds, which had to be checked by the Claimant. They were completed finally on the morning of 10 September. Since 10 September was the last day, an even closer focus upon the events as and when they occurred is required. At 9:08 the Grounds were received at the solicitors' office. The solicitor, Ms Moore, was on leave. She had gone to London on some private business of her own, which was to take her to a meeting in Covent Garden at lunchtime. She stayed at the Dorchester. She took the file of the Claimant with her on the 9th when she went. Before she went she discussed the lodging of the appeal with her paralegal, Ms Canton. She left Ms Canton a copy of the **Practice Direction**. The two agreed what would happen.

9. In her affidavit No 2 she expressed it in this way:

> **"13. … I explained we would lodge by email and that every single page needed to be lodged for it to be marked as received. I confirmed the deadline. I left with her a copy of the practice direction for lodging an appeal. I also advised that before lodging with the Employment Appeal Tribunal she should check her intention with them by phone and then call after sending the emails to ensure they had all been received. I said if she had any questions she should call the Employment Appeal Tribunal as they were generally very useful. During this conversation it was agreed that once everything was ready to send I would find a place in London that had WIFI to double check that every single page of the attachment was there and give final sign off."**

10. In accordance with that arrangement Ms Canton emailed the relevant material to Ms Moore. Very shortly after noon, Ms Moore broke out of her meeting in Covent Garden to access Wifi, check through the documentation and sign it off.

11. There is then a slight inconsistency between the description which Ms Moore gave in her first affidavit of what occurred and that in her second. In her first affidavit she said that she logged into her solicitors' firm's email remotely and managed to send the email with the two attachments to the EAT:

> **"8. … I requested a delivery receipt, which I forwarded to Debbie [Ms Canton] as proof it had been lodged. This was sent at 13:33. Within this email I also asked Debbie [to] contact the EAT and confirm receipt, as well as confirm the attachments could be opened. This is standard practice within the department …"**

At that stage, having received the notification of receipt, she believed that the document had been fully received.

12. At about 14:30 Ms Canton, in accordance with those instructions, checked with the EAT. She realised that the document had not been received because it was too large. Neither Ms Moore nor Ms Canton had appreciated that there was a limit to the size of material which could be downloaded to the EAT. It was at the time ten megabytes. That information, as it happens, is not available in the booklet called "The Judgment" handed to unsuccessful applicants before an Employment Tribunal with the Written Reasons. It is not available from the **EAT Practice Direction**, nor is it contained in the Rules. It is however, stated for those who access the website and can see it there, though I would accept it is not, in particular, highlighted.

13. That information, Mr Meichen submits, is information which Ms Moore as an employment practitioner should have known. In any event she did not.

14. Having realised at 14:30 that the documents submitted exceeded the permitted limit, Ms Canton and Ms Moore agreed by phone that Ms Canton at the office, and therefore the only one of the pair in a position to do so, would subdivide the attachments into six. She did so and began to submit those six. The first went through at 14:42. The others followed until at 14:53 the sixth was submitted but did not go through because it, being the Written Reasons, was too large. Unfortunately at this time the Internet services to the Claimant's solicitors' office failed. Internet outages were not unknown. However they had always been of short duration. What occurred on the afternoon of 10 September was out of the usual pattern. Instead of the Internet being down for a few minutes and then being fully restored, the Internet was down for very nearly a total of one hour from just before 15:00 until just before 16:00. Within that time it only operated for brief flickers: at 3pm for three minutes, 15:17 for eight minutes, 15:46 for one, coming back on at 15:57. Only one of those periods realistically gave enough time for anything of substance to be submitted. That was at 15:17. During that period Ms Canton had to reboot the computer systems. The scanner was attached to the email, as one would expect, and she began to submit the documentation. She had, by agreement with Ms Moore, broken down the Written Reasons into three chunks. It was part done when the Internet failed again.

15. It was now that Ms Moore again came to what she thought would be the rescue. She was contacted in London with the problem. Between 15:15 and 16:00 she had to decide whether she could go back to her hotel and obtain the copy documentation which she had with her in order to get it to the EAT in person. She understood from what a taxi driver said, being unfamiliar herself with the then location of the Employment Appeal Tribunal and with that part of London, that it would take too long, possibly, for her to do so. So being at or near the hotel she returned to it and took the relevant documentation in full to the office to be faxed. She arranged with the clerk there that that would be done and she stressed the importance of the

time limit. I have a copy of the coversheet which shows that she wrote on it in her handwriting the correct number, 0207 273 1045. Unfortunately the clerk did not faithfully enter that number into the fax machine. Instead of the last four digits reading "1045", though they appear quite clear to me on looking at the document, she inserted "7045". On three occasions she attempted to send the document through. It did not go through for obvious reasons.

16. The hotel receptionist returned twice to speak to Ms Moore to check that the number was right. That was confirmed by Ms Moore. Nonetheless the document was sent to the wrong number. It emerged later that evening, when Ms Moore had a copy of the fax printout, what the error had been, although as it happens it appears that the hotel eventually came to realise its own error because a faxed copy of the documentation was received at the EAT from a source at 16:08.

17. Whilst Ms Moore was attempting to use the fax to ensure that the time limit was honoured, Ms Canton was herself making efforts. Since the Internet service at the solicitors' office was not functioning, she went to see if local businesses could assist. None had a fax machine, but one had a direct scan email machine. Using that, she began to submit the Written Reasons. They were sent through. Unfortunately the first came though at 16:03, the second just after that, and the last at 16:08. Accordingly the submission of the full appeal, properly instituted, did not occur until eight minutes after the deadline.

The Law

18. The law is not seriously in dispute between the parties. As Mr Tariq Sadiq put it, the cases have recognised that the 42-day period given to would-be Appellants is generous. It is a limit, not a target merely to be aimed at. The Judgment or Written Reasons is a pivotal

document. Although, as it happens, it is sufficient so far as a Judgment or Written Reasons are concerned to institute an appeal fully for there merely to be a statement in writing that such a document has not been supplied and stating why, no such letter or email in writing was provided in this case. As it happens, that rule was introduced in those terms in 2004 and therefore after some of the authorities to which reference is habitually made. It may therefore indicate that the presence of the Judgment is of lesser significance in instituting an appeal, but I should make it clear that I accept what Mr Tariq Sadiq says, that it is an important and possibly the most important document apart from the Notice of Appeal itself in considering an appeal.

19. There is a difference of emphasis between the parties, however, when considering the effect of delays during the 42-day period. Mr Sadiq submits that one must consider why an appeal is not lodged throughout the period of 42 days. He puts it that, when considering the sufficiency of an excuse, one needs to consider why the appeal was not lodged by looking at the entirety of the 42-day period, relying for that on an observation of HHJ McMullen QC in the case of **Muschett v London Borough of Hounslow** [2009] ICR 424, paragraph 5(vi).

20. For his part Mr Roberts, who appears for the Claimant, submits that in the case of **Westmoreland v Renault UK Ltd**, 18 August 2009, UKEATPA/1571/08, HHJ McMullen QC added further to what he had said in **Muschett**. He had to consider in that case whether to exercise his discretion to extend time for an appeal which had been lodged two days out of time. He said this:

> **"16. … I have already in *Bost Logistics* and *Muschett* expressed my disagreement respectfully with the judgment of Burton P in *Woodward* [*v Abbey National plc* [2005] IRLR 782] for at para 33 it requires an examination of whether it was impossible throughout the whole of the 42 days for an appeal to be lodged. That, as I said in *Muschett,* is not the jurisdiction. Burton P held that that was required by [*United Arab Emirates v Abdelghafar* [1995] ICR 65, more commonly known as *Abdelghafar*] and *Aziz* [*v Bethnal Green City Challenge CO Ltd* [2000] IRLR 111] but that approach is found in neither, nor is it cited or reflected in *Jurkowska* [*v Hlmad Ltd* [2008] ICR 841 CA]. Those latter three, but not *Woodward,* are cited in PD3.7. The Registrar relied upon *Woodward*. Since then, HHJ Hand QC has expressly approved and followed *Muschett* to the letter: *Hakim v The Italia Conti Academy of Theatre Arts Ltd* UKEATPA/1444/08. I hold that it is wrong to require an Appellant to show that throughout**

the entire 42 days it was impossible, or not reasonably practicable, to lodge an appeal, or to withhold discretion if there was a stage in the 42 days when the Notice of Appeal could have been lodged. Impossibility is not just a good excuse, it is perfect. None of the examples in PD3.7-8 is impossibility of performance. Reasonable impracticability (as for presenting a claim in Employment Rights Act 1996 s 111) is not the test either, but it may be a useful guide. This is an open discretion available to the Registrar or to a judge to exercise judicially in accordance with established principles. What is required is an acceptable explanation, excusing inaction or imperfect lodging of the appeal, during each stage within the 42 days, or a compelling other reason."

21. For my part, I would say this. It seems to me that the behaviour of the parties during the entirety of the 42-day period is relevant. However, a party does have 42 days within which to lodge an appeal. The discretion may be referred to as open, but it is a discretion which, like any judicial discretion, must be exercised with due regard to reason, relevance, logic and authority insofar as authority is relevant. Here, authority shows that the principle to be applied is in general terms an unforgiving one. I must, in particular, exercise my discretion in this case with a proper regard for consistency. The danger of sympathy in any one case with the particular circumstances of any one Claimant may lead to making a decision which treats that litigant's case in a different manner from the way in which the court would treat another in materially similar circumstances. The guidance of case-law is thus important in avoiding this.

22. I would in general terms adopt the approach which HHJ McMullen indicates. But it seems to me that every case will turn on its own particular circumstances, that greater regard is likely to be had as a matter of simple practicality to how time was spent in the period immediately before the occurrence of the deadline and that earlier periods are less likely to be of significant relevance. It is nonetheless important to note that, if litigants leave things to the last moment, they are taking a risk and they cannot then complain if that risk materialises where it is a real and obvious risk, as most are, such that the appeal is then not in time even if it is only just a little bit out of time.

23. I was referred to the case of **Peters v Sat Katar Co Ltd** [2003] EWCA Civ 943. That case demonstrates that there is a discretion which may in appropriate cases, notwithstanding its general strictness, be exercised in favour of a would-be Claimant. In that case a litigant in person did not submit her appeal such that it was received by the Tribunal in time. It was 11 days late. However, in her case she had posted the Notice of Appeal well in advance of the expiry of the time limit. The failure was not hers. The failure was that of the postal service. She made an enquiry, albeit some days after the expiry of the time limit, which revealed its late delivery.

24. The Court of Appeal decided that it would exercise its discretion to permit her to proceed in those circumstances. She had been acting entirely reasonably. I note that in that case the time which elapsed prior to her putting the document in the post was not time which figured significantly in the reasoning as being a consideration which should tell against her entrusting a document to the postal service which was delivered unforeseeably late.

25. The second matter which I accept from Mr Roberts is that it is in general undesirable to rely more heavily on hindsight than the fair disposal of an appeal might allow (see **Jurkowksa v Hlmad** [2008] EWCA Civ 231 at paragraph 47). The critical question is, I accept, that in effect identified by Mr Meichen in his submissions, which derives from **Abdelghafar**. Mummery J, in the familiar passages beginning at page 69 of the report in the ICR headed "Exercise of discretion" and followed by "Application of principles" on page 71, emphasised (see the bottom of page 70, the top of page 71) that the would-be Appellant's:

> **"… only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default."**

26. The Judgment then continues to set out a number of considerations in which the principles are applied. At 2, page 71D-E, he again repeated that the Appeal Tribunal's discretion would not be exercised:

> **"… unless the appellant provides the tribunal with a full and honest explanation of the reason for non-compliance. If the explanation satisfies the tribunal that there is a good excuse for the default, an extension of time may be granted. …"**

27. In the list which followed, as an example of explanations which have been rejected and were inappropriate, Mummery J included "oversight of the passing of the limit, for example, by a solicitor under pressure of work". Mr Sadiq prayed this in aid in suggesting that the reason for the delay occasioned by counsel's illness, followed by one day when he attended to two pre-booked conferences in preference to dealing with the appeal, amounted to pressure of work and therefore did not itself excuse the passage of time. I accept Mr Roberts's riposte to this that regard must be had to the entirety of the phrase. What Mummery J was concerned with there was a situation where the only excuse for a time limit being missed was that the solicitor had simply had other things to do.

28. The questions which must be addressed by the Appeal Tribunal, page 72, are: (a) What is the explanation for the default? (b) Does it provide a good excuse for the default? (c) Are there circumstances which justify the Tribunal taking the exceptional step of granting an extension of time? The parties are agreed that, so far as the latter is concerned, exceptionality is not a criterion of its own. It is a fact that the circumstances in which the discretion will be exercised will turn out to be rare and exceptional, but it is no part of the test that they must be before the discretion may be exercised.

Observations and Conclusions

29. I was not given any direct oral evidence. There would have been questions which Mr Sadiq would have wanted to address, in particular to Ms Moore. But, for reasons which were explained to me at the outset of the hearing, she has been unexpectedly unavailable to attend. Mr Sadiq made it clear that he did not attack her honesty.

30. In the light of the material before me, I have concluded the facts as I have set them out above. I accept that there has been a full and honest explanation for the delay. The issue for me is whether that is a good one in the circumstances.

31. I have had regard, in particular, to the following. The explanation is full in the sense that it is vouched with relevant documents from which I can be certain as to the time and which speak themselves as to the very considerable efforts which, albeit on the final day, the solicitors took to submit the appeal. The essential point made for the Respondents is that the appeal could have been submitted earlier. I think there is some force in that. But this is not a case in which the efforts to submit an appeal were left so late in the day that there was no reasonable opportunity to redress them should there be an error which might be anticipated.

32. What defeated the claim being put in on time was, in my view, a highly unusual combination of circumstances. Those circumstances could not, in my view, reasonably have been anticipated as all coinciding as and when they did. I take into account that it is self-evident from my recitation of the chronology that during 10 September the solicitors made their best efforts to submit the appeal on time. They were thwarted by circumstances to an extent which they could not, in my view, reasonably have foreseen since they had between them arranged what Mr Roberts describes as Plan A and Plan B, and ultimately had to adopt Plan C.

Thus Plan A was for Ms Moore to submit the documents, having approved them. That being done at around midday, there was time to rescue matters should things go wrong, as they did. Plan B relied on Ms Canton back at base. Although it is right to say, and the evidence called for the Claimant does not disguise it, that Internet outages were not uncommon, what was uncommon was the length and extent of this particular Internet outage. It would have been unexpected.

33. Notwithstanding that, Plan C was for Ms Moore, now approaching the last minute, but still with sufficient time, to fax the document through. That would have been successful just as would breaking down the size of the files by Ms Canton back at the office had the unexpected not happened, that is that the receptionist, to whom was stressed the importance of ensuring that the documents were sent through by fax to a clearly written phone number, misentered the number. Even then, an attempt was made to obtain services from local businesses, which albeit now getting rather too late had some prospect of success.

34. These did follow earlier delays. But with the exception of the first ten days, which I have already described as regrettable, the actions in the particular circumstances of this case were relatively prompt. Counsel's illness was itself another unexpected and relatively unforeseeable event. But in every other respect there was no case at any stage of anyone sitting on their hands except for the first two weeks, ten days so far as the solicitors' office was concerned, when the file was simply put on one side and could and should have been sent from Hereford to Worcester.

35. I do not therefore think that this is one of those cases, of which there are too many, where the parties deliberately let time pass without doing anything, or wake up only at the last

moment to the approach of the time limit but, rather, one where they did their best to comply and were defeated late, but not very late in the day, by circumstances beyond their control. It has in many ways much more in common with the case of **Peters** than it does with many others, though it is a mistake in this area of law to look closely at the particular facts of earlier decisions. Broad consistency is what is required.

36. In the end I have come to the view that the question is the reasonableness of the actions taken, as Mr Meichen puts it. I put to counsel whether time should be extended in circumstances in which it was to be supposed that a litigant had brought his appeal, written out in full, in order to deliver it in person to the EAT on the morning of the last day, and had only been prevented from doing so by taking a taxi to the Appeal Tribunal which was then involved in a catastrophic accident, hospitalising him for the evening. The response which Mr Sadiq initially gave was that time should not be extended in such a case because of the earlier opportunities which would have been missed. But I think on reflection he accepted that it might be that in some situations some events would not be reasonably foreseeable. It seems to me that that is certainly a qualitative approach to take to circumstances such as these. It is another way of asking, perhaps, if the circumstances are unusual such that a decision in favour of the Claimant in this case would not be inconsistent with the decisions against would-be Appellants in others.

37. Taking all into account, I have concluded that in this particular case, in these particular circumstances, I should exercise the discretion which I have to extend time by half an hour to permit the receipt of the Notice of Appeal, half an hour simply chosen because it indicates the slight nature of the extension required, it being accepted that the Notice was complete by 16:08. I do so for the reasons which I have expressed. I should, however, wish to pay tribute to all

counsel for the thoroughness with which they have presented their cases, and for the succinctness but appropriateness of their arguments, which has made this appeal both a pleasure for me to preside over and also not entirely easy to resolve.

38. For those reasons the appeal formally is dismissed. The decision is to extend time.