Appeal No. UKEAT/0389/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal on 17 February 2015

Judgment handed down on 26 March 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

SITTING ALONE

DEANGATE LTD — APPELLANT

(1) MR J HATLEY
(2) MR J B PATTERSON
(3) MR P KURTZ — RESPONDENTS

SECRETARY OF STATE FOR JUSTICE — INTERVENING

JUDGMENT

APPEARANCES

For the Appellant	MR G M PEARSON (in Person, on behalf of Deangate Ltd)
For the Respondents	MS J SHEPHERD (of Counsel) Instructed by: BTMK Personal & Commercial Law 19 Clifftown Road Southend-on-Sea Essex SS1 1AB
For the Intervener	MR BEN COLLINS (of Counsel) On behalf of the Secretary of State for Justice Instructed by: Treasury Solicitors 1 Kemble Street London WC2B 4ZS

SUMMARY

PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE – Application/Claim

Three claimants completed forms of application for fee remission some days after submitting their claims on line. The Respondent argued that the ET should have rejected the claims, as it was obliged to do by rule 11 of its Rules of Procedure since the applications for remission could not be said to "accompany" the claim as the rule required, and that any repeat application would then have been hopelessly out of time. The ET thus had no jurisdiction. The ET considered, and rejected this, since it thought that to send in an application within 7 days of having presented the claim was to accompany the claim with the application. If that was not so, then rule 6 allowed the ET to waive irregularity, and it was just to do so. These conclusions were not accepted on appeal: but a submission made by the Secretary of State, intervening, that to tick, online, a question asking if the claimant intended to apply for remission amounted in the context of the legislation to an unequivocal choice as between paying a fee or applying for remission, and thus was sufficient, was. Accordingly, the appeal was dismissed.

Observations made that it must follow from the Secretary of State's submissions that it is sufficient to amount to accompanying a claim with an application for remission for a claim made by post or to an office to be accompanied with a statement that that is what the claimant is choosing to do.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Rule 11(1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 provides:-

> **"The Tribunal shall reject a claim if it is not accompanied by a Tribunal fee or a remission application."**

"Shall" is mandatory. The Respondent employer ("Deangate") argues that claims against it by three former employees, in which their originating application forms were submitted on line one day before expiry of the time limit for claiming, had to be rejected since they were "accompanied by" neither a fee nor application for remission. If this were so, then any repeat application which, this time, was accompanied by either a fee or an application for remission would inevitably have been out of time, and the Tribunal would have had no jurisdiction to consider it.

2. The Employment Tribunal here did not reject the claims. Deangate complained to an Employment Tribunal at Colchester that it should have done. Employment Judge Ferguson, sitting alone, rejected its case. There were two bases for this. First, she considered that the claims had actually been accompanied by a remission application; second, if that were not so, Rule 6 of the Tribunal Rules enabled her to correct "irregularities and non-compliance with the rules" and she would have considered it just to waive or vary the requirement to reject the claim forms in the case before her.

3. These two grounds have been the focus of submissions before me on appeal: an initial hesitation with which Judge Ferguson began her judgment (that there did not appear to be any mechanism in the Rules which entitled a Respondent to challenge a Tribunal's decision to accept a claim) has not formed any part of the argument before me, which has proceeded on the

implicit basis that if the Tribunal was obliged to reject the claim, and could not rescue it by the exercise of its powers under Rule 6, it would be acting outside its jurisdiction by then considering it.

4. The essence of the Judge's decision is contained in paragraphs 7- 9:

> "**7. The Claimants were all summarily dismissed on 14 November 2013. The claim forms were submitted online on 13 February 2014, the last day before the expiry of the time limits for the Claimants' claims. In Section 15 of the claim form (Additional information) each Claimant wrote "I have sent my application for fee remission by post". The fee remission applications were sent by Special Delivery on 18 February 2014 and would therefore have arrived on 19 February 2014. Such applications cannot be submitted online because original documentation is required. Ms Willis produced an attendance note of a telephone conversation with the Tribunal office on 12 February 2014 which records that the Claimants' representatives were advised that, provided the documents arrived at the Tribunal within 7 days of the online application, they would be treated as having been submitted with the claim form and the date of the online submission would be taken as the date of presentation. On the Tribunal's website for submission of claim forms, the following guidance is given:**
>
> > ***Online claims only: if we do not receive the signed remission form and evidence in the post as soon as possible and within 7 calendar days of submitting yourET1, your application will be refused and you will required to pay the full fee for your claim.***
>
> **8. The Tribunal office evidently accepted in this case that the claim forms were "accompanied by" the fee remission applications for the purposes of Rule 11, albeit that they were sent by post a few days later. I did not hear any formal evidence on the issue, but the attendance note produced by Ms Willis and the guidance on the website suggests that this is consistent with a general policy of permitting remission applications by post within 7 days of the online submission of a claim form.**
>
> **9. In my view it is a permissible interpretation of Rule 11 to treat remission applications made in this way as "accompanying" a claim form submitted earlier online. Even if I am wrong about that, Rule 6 enables me to correct "irregularities and non-compliance" with the Rules:**
>
> > **6 Irregularities and non-compliance**
> > **A failure to comply with any provisions of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following-**
> >
> > > **(a) waiving or varying the requirement;**
> > > **(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;**
> > > **(c) barring or restricting a party's participation in the proceedings;**
> > > **(d) awarding costs in accordance with rules 74 to 84.**

> **If there has been any failure to comply with Rule 11, therefore, I consider it just to waive or vary the requirement to reject the claim forms in this case. The claim forms themselves were submitted in time and there has been no prejudice to the Respondent caused by the remission applications being submitted 5 days later. The Claimants' representatives appear to have been informed by the Tribunal that this would be an acceptable way of proceeding and they relied on that information**."

5. The issues of law to which this gave rise emerge from the written reasons given on the Sift at the Appeal Tribunal when directing a full hearing, which, since they became the focus of much of the submissions deserve repetition:

> **"This appeal throws up the meaning of "accompanied" in Rule 11(1). It is an ordinary English word; and it is not immediately obvious that a fee payment or application for remission made 6 or 7 days later "accompanies" an application made 6 or 7 days earlier. An analogy might be the 11 year old who turns up to the cinema alone, to see a film with a certificate which requires him to be "accompanied" by an adult if under 12 and asks to be let in on the basis his Dad will turn up two to three hours later… if similarly entry to the ET system has in law to be denied unless and until accompanied, by the time the fee application for remission can be matched with the ET1, the latter may be too late; the question is thus jurisdiction, since the ET has no discretion but to reject an unaccompanied ET1, and it was plainly reasonably practicable to put the ET1 in on time since (but for the fee payment) that was done… Rule 6 may not provide the escape route from these consequences which the Judge thought, though this is arguable: can an absence of jurisdiction be waived in the way suggested?"**

It was also noted that according to the Employment Judge the system regularly worked as it had in the present appeal, and it might therefore be that Tribunals had been determining claims when technically they might have had no jurisdiction to do so. There were important repercussions of any decision, and accordingly the appropriate Government Department should be asked if it wished to intervene. Before me, therefore, I have not only had submissions from Mr Pearson, an officer of Deangate on its behalf, and Jude Shepherd, Counsel on behalf of the Respondents, but also from Ben Collins, Counsel on behalf of the Secretary of State for Justice as Intervener.

Submissions

6. Deangate argues that the word "accompanied" is an ordinary English word, and as such has a plain and unambiguous meaning which cannot be ignored. To hold that a remission application "accompanied" a form submitted a week previously was outwith any reasonable meaning of the word. Even if, once submitted, an application for remission could be put together with the claim form, so as then to accompany it, this would constitute accompaniment only at that point, and not at some earlier stage when the application for remission simply had not yet been completed. Rule 6 could not be used to waive an absence of jurisdiction.

7. The Claimants rely heavily upon the practical arrangements made in respect of filing applications with the Tribunal and discharging the obligation in respect of fees. Ms Shepherd submits that on the day before the claims were submitted online, the Claimants' solicitor telephoned the Tribunal helpline to explain that she was intending to submit a claim online and to ask about the process for obtaining fee remission. She was told that she should indicate online on each form that the relevant Claimant wanted to apply for fee remission, and should post the fee remission form with the relevant evidence to the central office. It needed to arrive within seven days of making the claim online. As long as this form was received within that time limit the claim would be considered as having been submitted on the date it was submitted online.

8. Ms Shepherd argues that although the Practice Direction issued by the President of Employment Tribunals (England and Wales) does not itself cover the point, additional information provided along with the Practice Direction tells would-be applicants that the speediest and most efficient method of presenting a claim will normally be by using the online submission service. This thus encourages Claimants to use the online system. The information, in line with guidance on the Tribunal Service website, anticipates that a claim form will be

submitted online in the first instance, with any application for fee remission to follow. This is capable of amounting to "accompanying" the application, since the Oxford English dictionary not only defines "accompany" as "to go with (a person) as a companion, escort or attendant" but also to "add or join (a thing or person) with another; to supplement with". This is given as one of the ordinary meanings of the word, and is sufficiently wide to encompass the online submission of a claim form, with a form of application for remission form being sent later. "Accompanying" includes a situation where two documents do not arrive at the Tribunal together but are nevertheless ultimately joined. It would not be practical to suggest that claimants should send a fee remission application by post *prior* to submitting a claim online, since they are encouraged to use the reference number supplied when the claim is filed online. If submitted beforehand, and thus without any such number, matching up the application and the claim form could cause significant administrative difficulty.

9. A purpose of strict time limits is to ensure that claims are made in a timely fashion so that those responding to a claim know the claim they have to meet within a short period of the events complained of. That has happened here. Deangate suffered no prejudice as a consequence. It would be neither just nor equitable to require those claimants wishing to seek fee remission to have to submit their claims at an earlier stage than the expiry of the time limit merely to ensure that the fee remission form would also be received at the Tribunal before expiry of the time limit. Moreover, this would be to treat those seeking remission less favourably than those able to pay fees, since that may be achieved online.

10. The Secretary of State agrees that "accompanied" is an ordinary English word, and suggests it involves an element of contemporaneity. Rule 11 does not however, set out requirements as to the form or content of an application for remission. Accordingly, bearing in mind (a) that although claims can be presented online, remission applications may not (as yet)

be made in that way; and (b) it was plainly the intention of Parliament to provide the claimant with an opportunity to make such an application, whatever the method of presentation, Rule 11 should be construed such that ticking "yes" on the online claim form where it asks if the claimant intends to make an application for remission is to be treated as actually making such an application. It is the *detail* of the application which follows promptly thereafter by post; the application itself is sufficiently made to be an application within the rule where the box is ticked.

11. The Secretary of State made no submissions as to the effect of Rule 6 or as to jurisdiction.

Statutory Background

12. Fee charging was first imposed in respect of Employment Tribunal claims on 29th. June 2013, following the making of The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 ("the Order") (SI 2013/1892). Part 2 of the Order deals with fees in Employment Tribunals. Article 4(1), within that Part, provides

> **"A fee is payable by a single Claimant… (a) when a claim form is presented to an Employment Tribunal ("the issue fee")."**

Remission is dealt with in Part 4 of the Order. Article 17(1), within that Part, provides that Schedule 3 to the Order applies for the purpose of determining whether a person is entitled to the remission or part remission of any fee otherwise payable under the order.

13. Schedule 3 makes detailed provision relating to remission. Paragraph 15 of that Schedule provides in respect of applications for remission of a fee that:-

> **"(1) An application for remission of a fee must be made at the time when the fee would otherwise be payable"**

14. I observe that given the wording of Article 4(1) this means when the claim form is presented to the Tribunal. I would, however, also note that "payable" is the equivalent to "due". Nothing is said nor implied as to any particular consequence of non-payment at this time. Paragraph 15 continues:-

> **"(2) Where an application for remission of a fee is made, the party must – (a) indicate the fee to which the application relates; (b) declare the amount of their disposable capital; and (c) provide documentary evidence of their gross monthly income and the number of children relevant for the purposes of paragraphs 11 and 12.**
>
> **(3) Where an application for remission of a fee is made on or before the date on which a fee is payable, the date for payment of the fee is disapplied.**
>
> **(4) Where an application for remission is refused, or if part remission of a fee is granted, the amount of the fee which remains unremitted must be paid within the period notified in writing to the party, or the fee group (as the case may be)"**

15. In practice, form EX160 is used for applications for fee remission. The form is not prescribed by legislation. Its use is a matter of practicality, and ensures both a greater chance of a claimant setting out the necessary information (which is prescribed) and greater ease of administration.

16. Since a fee is payable on the presentation of a claim, it is necessary to see what the Rules provide amounts to presentation. Rule 8 of the Employment Tribunal Rules 2013 reads:

> **"A claim shall be started by presenting a completed claim form (using a proscribed form) in accordance with any practice direction made under Regulation 11 which supplements this rule."**

17. Regulation 11 empowers the President of Employment Tribunals to make practice directions. He issued a presidential Practice Direction on the Presentation of Claims on 29th. July 2013, when the fee charging regime came into force. In it he set out three methods of starting a claim: online, using the online form submission service provided by HMCTS; by post to the Employment Tribunal central office; or in person to an employment tribunal office listed in the schedule to the Practice Direction.

18. The Practice Direction itself does not help with the force of the word "accompanied". It simply re-states, at paragraph 5, that the Tribunal should reject a claim if it is not accompanied by the appropriate fee or remission application.

19. Additional information (accompanying, though not itself a part of the Practice Direction – a fact which is stated in the text) added:

> **"the speediest and most efficient method of presenting a claim will normally be by using the online submission service. The online system will assist in calculating the fee which is due, will ensure that a member does remember to claim or apply for remission (since it will not allow the claim to be submitted otherwise) and will reach the fee processing centre very quickly. It will also leave no room for doubt as to when the claim was presented since this is recorded electronically. That may be important if the claim is being presented close to the end of the limitation period…"**

Discussion

20. The way in which the scheme of fee remission has been implemented cannot affect the meaning of the statutory provisions concerned. If "accompanied" means as Mr Pearson submits, the fact that a remission application cannot be made online, and that since a case number is needed to identify the claim to which the application relates it is highly inconvenient for an application for remission to be made either in advance of the submission of an online claim form or contemporaneous with it, rather than following it, is beside the point. So too is the fact that this may prejudice a claimant. The context within which I have to interpret "accompanied by" is that set by the statutory provisions. It cannot be set by the practical arrangements, which should facilitate the operation of the rules rather than influence their construction. I reject Ms Shepherd's arguments which are to contrary effect.

21. A significant feature of the legislation is that the statute does not itself prescribe any particular form of application. Nor does the Order. Nor do the rules. So far as the rules are

concerned, this contrasts with the approach taken to the form of application for making a claim, which must be completed in accordance with a prescribed form. It is conventional but not legislatively required to use Form EX160, which has been sensibly devised by HMCTS, for remission applications.

22. Though the Order specifies certain information which must be provided (Schedule 3 paragraph 15) it does not itself provide that an application is invalid without that information. Rather, it identifies information which must be supplied "where an application for remission of a fee is made". As a matter of language this suggests that an application may be an application, properly so called, albeit that it is incomplete in the absence of the information specified.

23. In agreement with the submissions of Mr Ben Collins for the Secretary of State, I accept that "accompanied" is an ordinary English word. Mr Pearson agreed. In addition to the principal definitions derived from the dictionary upon which Ms Shepherd relied – "go along with"; "go with, attend as companion" - he would add "occur in association with". To this extent, therefore, his definition permits a greater elasticity of timing than would those regarded as central by either Ms Shepherd or Mr Collins.

24. The argument for Mr Pearson assumes that the remission application was made some days after the claim form had been presented. If this were the case then, despite the degree of width to the expression "occur in association with" and the margin afforded by contemporaneity, I would find it difficult to think that the application for remission accompanied the claim within the meaning of the rule, as the Judge assumed: it is implicit in what she says in paragraph 7 and in the opening sentence of paragraph 8. However, the principal thrust of Mr Collins' submissions was that the application was made online when the claim form was being completed, and not as the Judge assumed entirely in some later

document. He said, without contradiction, that the online portal requires Claimants to state whether they intend to submit an application for fee remission. In one of the opening online pages, after having indicated the type of claim the Claimant wishes to make (whether a single claim or on behalf of one or more persons) it states "Having read the guidance do you intend to submit an application for remission?" An answer is required, by ticking either 'yes' or 'no', without which the completion of the claim form cannot proceed.

25. The form itself indicates that this is not an application for remission as such: not only does it use the words "Do you intend to submit an application…" which suggests that the form is not such an application, but at the conclusion of completion of the online claim, under the heading "Remissions" in a case in which a Claimant has ticked the 'yes' box as to his intention, it observes in bold type "please note that your claim will not be progressed until your remission application has been received."

26. Nothing daunted, Mr Collins argues that by ticking the 'yes' box, a claimant is actually making the requisite application. This argument shifts the focus from asking whether "accompanying" was satisfied, to asking what, in context, amounts to an application. If form EX160 simply asked a claimant applying for remission to tick the box to say so, then that would be to make such an application - the precise form of any such application is not specified, and such an indication would be entirely sufficient, even if further detail had to be supplied before the application could be resolved. The wording of the Form, however, on the face of it refers to a future event, rather than an accompanying one – "intend" speaks to what will happen in the future. However, I accept Mr Collins' retort to Mr Pearson's emphasis on this. It would be wrong to interpret the wording of EX160 as if it were statute, since it is not. The legislation provides for a choice to be made, at the time of presenting a claim, between paying a fee or applying for remission. It was the intention of Parliament that, however a claim

was presented, there should be an opportunity for a claimant to seek remission of the fees otherwise payable. The online application leaves no room for doubt as to which of the two alternatives is being pursued. Seen in its legislative context, therefore, this has all the necessary attributes of an application. Given the wording of paragraph 15 of Schedule 3, it requires to be augmented by further information. Mr Collins argues that the policy of the Tribunal service of allowing the further information to be given within 7 days (in practice by completing Form EX160 and submitting that together with any documentary material required within that period) provides for this to be done within a sensible timescale, and does not offend against the legislation nor affect its interpretation. It is unnecessary for me to express any final conclusion on whether a blanket policy of allowing seven days' grace for receipt of the further information is lawful, though I would be inclined to accept it, since it is sufficient for the purposes of the appeal to say that in each of the three claims here, as in any case submitted online, the fact that the Claimant made a choice between fee payment and application for remission is sufficient in the context of this legislation to be an "application" despite the words used in the form. Those words have the force not of indicating a choice to be made in the future, but the fact that, as the online service is at present, further information will yet have to be supplied, and a form of application containing that information remains to be completed.

27. My acceptance of Mr Collins' argument is within the narrow limits of asking whether as a matter of fact the completion of the online forms in this case amounted to an application. I do not accept all he submitted. Part of his argument was that if the statute were not interpreted in the way he suggests it would in effect be impossible for any claimant to comply with the requirements of rule 11 when presenting a claim on line. I do not accept this as an argument in favour of the construction he advanced. First, it would amount to the particular design of the online process determining what the construction of the legislation should be. That is the wrong way round: the process should comply with the meaning of the statute, not the converse.

If HMCTS failed to design it appropriately, a consequence would be that the claim should be rejected rather than the legislation read differently. Second, this would not render ineffective Parliament's intention that claimants should be able to accompany their claims with either a fee payment or an application for remission. A claimant is able, within the statutory framework, to do this – there are two methods other than online submission which are offered by the Practice Direction by which it could be achieved, first by delivering both together in person, second by post.

28. If "ticking the yes box" did not amount to making an application this would have the unhappy consequence that in practice forms could be submitted online only by those with the funds to pay fees, and would disadvantage those who had internet access but no resources: but this, again, is not a necessary feature of the online submission of claims. It is, rather, a defect in the system in its present state of evolution, which could, moreover, easily be remedied by changing the wording facing an online claimant so as to state not that an application for remission is to be, but is being, made, with details to follow: or, as the Secretary of State tells me is his current intention, incorporating the essential parts of what is now form EX160 in what has to be filled in online. Accordingly, though happy that the conclusion I have reached avoids the undesirable result which would otherwise have applied should the form remain as it presently is, I do not accept I can take the argument referred to in the last paragraph above into account in interpreting the statute as Mr Collins asks.

29. Further, his argument may not have the unhappy consequence of discriminating between those who apply online and those who do so by post or by hand which might be supposed. It is to the effect that it is sufficient application for remission to say that one is applying, but that details of the application will follow. So far as I can see, there is no reason of principle why this should not apply to other methods of presenting a claim. Any claimant who sends a claim

by post, and any claimant who attends a Tribunal to deliver a claim by hand, might well find it more convenient to provide all the required information for remission with their application: but if all they simply say is that they are applying for remission, with details to follow, it is a consequence of the Secretary of State's argument before me that a Tribunal would have no right to reject the claim under rule 11. Though this means that those who claim online are in no worse a position than those who present a claim by either of the other two current methods, it has obvious practical consequences which the Secretary of State may wish to address, through appropriate rules: it is, after all, a consequence of his argument on this appeal.

30. Given my view that in this case there was an application for remission made online by each of the Claimants, it follows that it accompanied the claim within the meaning of Rule 11. It is therefore unnecessary for me to consider whether the second ground for the Judge's decision (exercise of the rule 6 power) holds good. I have had full argument on it, however. Though it is an observation, and not essential reasoning, I would have found it difficult to accept that it does. First, it requires the duty which rests on the Tribunal in rule 11 to be read as if it were a requirement to be met by a claimant. Otherwise it would have the consequence that the rule permitted the Tribunal to excuse its own failure to perform an obligation specifically imposed upon it by the rule: to construe a rule which is mandatory in its expression as being entirely optional is problematic. If it was intended to be read as expressing an obligation on a claimant it is difficult to think it would be expressed in the way it is, since it would seem easy to provide for the obligation to have one application accompany the other to rest on the claimant. Tribunal rules are generally framed so as to make it clear to Tribunal users what they should do – yet the formulation of rule 11 means they have to work out that a Tribunal has an obligation to act in the specified way if they do not achieve a particular result, but nowhere addresses them directly so as to require it of them.

31. Second, rule 12 also provides for rejection by a Tribunal, in this case if there are "substantive defects": but in this case expresses a remedial power, not by reference to rule 6 but, under rule 12(3), by the judge telling a party how he might apply for reconsideration, thereby indicating that as a possibility under this rule. There is no such corresponding provision in respect of rule 11.

32. Third, there is some force in Mr Pearson's arguments that rule 6 specifically does not apply to rule 8(1), set out above. Regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (which must be kept distinct from rule 11) permits Practice Directions to be made. The material provisions of the Practice Direction made under this regulation, specifically related to the Presentation of Claims, are set out above at paragraphs 17 and 18. They include a statement that a Tribunal must reject a claim which is not accompanied by a fee or application for remission. This does not make it a knock-out point for Mr Pearson, since rule 8 is more obviously directed to the mode of presentation than to implementation of the fees regime. Moreover, he has to accept that rule 11 could have been included in the list of those rules which specifically were not subject to rule 6 powers, but was not. However, it may serve to strengthen the argument set out at paragraph 30, to the effect that the wording of rule 11 does not comfortably lend itself to identifying a duty resting on a claimant, as opposed to one imposed on a tribunal, such that it may not have been thought necessary to list it amongst the exceptions to rule 6.

Conclusion

33. I have differed in my reasons from those accepted by the Judge, but have ultimately reached the same conclusion as she did. Since it is not in dispute that each Claimant ticked the appropriate box, and my conclusion that to do so amounted to an application is one wholly of law, there is no other conclusion she could have reached. Despite the considerable thought that

Mr Pearson has put into his submissions, the appeal fails. It does so because I accept the Intervener's argument that what happened in the case of each of the Claimants was that an application for remission of fees did actually accompany the claim, being made in the same online submission as the claim even if it was only fleshed out when Form EX160 was later sent in.