Appeal No. UKEAT/0291/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 January 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MRS M SZMIDT — APPELLANT

AC PRODUCE IMPORTS LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAKE DUTTON (of Counsel) Clerks Room Equity House Blackbrook Park Avenue Taunton Somerset TA1 9PX
For the Respondent	MR TOM GRADY (Non-Practising Barrister) Avensure Ltd City Tower Piccadilly Plaza Manchester M1 4BT

SUMMARY

JURISDICTIONAL POINTS - Extension of time: just and equitable

Whether time should be extended in respect of a single act of discrimination on racial grounds (found by the Employment Tribunal to have been made out). In refusing to extend time the Employment Tribunal failed to balance prejudice to the Claimant (loss of a valid claim) with prejudice (if any) to the Respondent as part of the exercise of discretion: see **British Coal Corporation v Keeble** [1997] IRLR 336, paragraph 8. The Claimant's appeal allowed and point remitted to the same Employment Tribunal for reconsideration in light of the EAT Judgment.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the London (South) Employment Tribunal. The parties are Mrs Szmidt, Claimant, and AC Produce Imports Ltd, Respondent. The Claimant, who is of Polish origin, was employed by the Respondent until 26 March 2013. On 24 May 2013 she presented a form ET1 to the Tribunal complaining of unfair dismissal, racial discrimination, failure to provide particulars of employment and payment of outstanding monies. In particular, under her Particulars of Complaint, she alleged:

> **"On 7 January 2013, the director walked to desk [sic] and openly said to me that he would sack all Polish."**

2. The claims were resisted by the Respondent. In their Form ET3 Response, in answer to that specific complaint, it is said, at paragraph 8:

> **"The respondents deny that any director of the company said that all Polish employees were to be dismissed."**

3. The claims came on for hearing on liability on 12 and 13 December 2013 before a Tribunal chaired by Employment Judge Emerton. The unfair dismissal claim together with the failure to provide written particulars of employment claim were upheld. The money claims were dismissed. Material to this appeal the Tribunal heard evidence from the Claimant and Mr Cozzi, a director of the company, as to the remark imputed to him about sacking all Polish on 7 January 2013. By a Reserved Judgment, promulgated with Reasons on 17 February 2014, the Tribunal preferred the Claimant's account that the remark was made by Mr Cozzi on 7 January 2013, to his denial that he had said nothing of the sort (see paragraphs 30 to 32). Based on that factual finding the Tribunal accepted (paragraph 45) that Mr Cozzi and presumably through him the Respondent was guilty of an act of direct racial discrimination. However, that was a one-off act of discrimination; consequently the Form ET1 lodged on 24 May 2013 was out of

time, the primary limitation period having earlier expired on 6 April 2013. Thus the question was whether or not it was just and equitable to extend time for that race discrimination complaint, all other race discrimination complaints having been dismissed. The Tribunal declined to extend time (see paragraphs 47 to 54). Thus that claim also was dismissed.

4. Against that refusal to extend time this appeal by the Claimant now comes before me for Full Hearing on the directions of HHJ Richardson following a Rule 3(10) Hearing held on 17 July 2014. The narrow point advanced on behalf of the Claimant by Mr Dutton, now appearing on her behalf, is set out at paragraph 28 of the Grounds of Appeal as amended. It is this, that despite the Tribunal directing themselves to the guidance of Smith J in **British Coal Corporation v Keeble** [1997] IRLR 336 by reference to the factors contained in section 33 of the **Limitation Act 1980**, the Tribunal failed to carry out the balance of prejudice exercise between the parties in deciding whether or not to extend time, a point to which Smith J refers at paragraph 8 of **Keeble** in the context of the analogous provisions under section 33 of the **Limitation Act**.

5. That failure, on the particular facts of this case, manifests itself in both directions. First, as Mr Grady accepts, there is no reference in the Tribunal's reasoning at paragraphs 47 to 54 to the prejudice suffered by the Claimant in refusing to extend time, in particular that on the Tribunal own findings she would have won in relation to the 7 January remark complaint but for the limitation bar; secondly, whereas the Tribunal considered (see paragraph 53) that it was in principle (my emphasis) prejudicial to a party, i.e. the Respondent, to have to respond to out-of-time discrimination claims, the Tribunal did not then go on to consider whether, on the facts of this case, the Respondent had indeed suffered any prejudice by the seven-week delay in bringing this claim. That is a relevant enquiry in circumstances where the issue involved a

question of fact, did Mr Cozzi make the offending remark or not on 7 January, an issue which was raised in the form ET1 and denied in the Respondent's ET3 and which was the subject of oral evidence at the hearing from both the Claimant and Mr Cozzi. As Mr Grady accepts, that is not an issue the determination of which gave rise to any prejudice to the Respondent. I entirely accept that no one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, what seems to have caused the Tribunal to terminate its examination of the extension of time issue prematurely in my view is the Claimant's failure, then acting in person, to put forward any explanation for her delay in bringing this particular claim, as opposed to other claims, including those of racial discrimination culminating in dismissal and unfair dismissal which were brought in time. Whilst that is plainly a factor to take into account (see **Keeble**) in favour of the Respondent, it does not obviate the need to go on to consider the balance of prejudice, as HHJ Shanks explained in the recent case of **Pathan v South London Islamic Centre** (EAT 0312/13/DM, 14 May 2014). See paragraph 17, to which I have been referred.

6. In short, I accept Mr Dutton's submissions. In failing to take into account a relevant consideration, namely the balance of prejudice to both parties in exercising their discretion, the Tribunal, in my judgment, fell into error.

Disposal

7. The question then is what should be done with this appeal? Mr Dutton invites me to decide the extension of time point myself; alternatively, he submits that the only possible answer, on the facts, is that time should be extended. Mr Grady submits that the point ought to be remitted to the ET for reconsideration. It is common ground between Counsel that in that event the case should return to the same Tribunal. I also agree.

8. I bear in mind the recent Court of Appeal guidance in **Jafri v Lincoln College** and **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 544 and 630 respectively. Absent agreement that I should deal with the matter myself I agree with Mr Grady that the matter must return to Judge Emerton's Tribunal for reconsideration in the light of this Judgment. The outcome is far from certain. If time is extended it will follow that the discrimination claim succeeds in relation to the 7 January remark. The Tribunal will then go on to consider the appropriate **Vento** award for injury to feelings. I am told that the unfair dismissal Remedy Hearing following the Liability Hearing has now taken place, an application to adjourn it having refused below, so that a further hearing will now be necessary.

Fees

9. Following my Judgment in this case the successful Appellant through Mr Dutton applies for her fees of bringing these EAT proceedings. Two fees are involved. First a lodgement fee of £400 in respect of lodging the appeal, and then having succeeded in part in obtaining a Full Hearing, the hearing fee of £1,200 for today's hearing. The appeal was not permitted to go straight through to a Full Hearing. Grounds 2 and 3 were ultimately rejected at the Rule 3(10) Hearing, all grounds having been rejected initially on the paper sift by Judge Birtles.

10. Sometimes the judgment of Solomon is required in these applications. Doing the best I can to balance the position of both the Appellant and Respondent before me I have reached the conclusion that the Appellant must bear the initial lodgement fee of £400. However, having succeeded at the Rule 3(10) stage to a limited extent and then at this hearing, it is right that the Respondent should pay the hearing fee of £1,200. Accordingly I shall order the Respondent to pay the fee of £1,200 to the Appellant.