Appeal No. UKEAT/0288/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 December 2013

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

DR M STEPHENS APPELLANT

KINGSTON UNIVERSITY HIGHER EDUCATION CORPORATION RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS HOLLY STOUT (of Counsel) Bar Pro Bono Unit
For the Respondent	MS IRIS FERBER (of Counsel) Instructed by: Kingston University River House 53-57 High Street Kingston-upon-Thames KT1 1LQ

SUMMARY

JURISDICTIONAL POINTS

Extension of time: reasonably practicable

Extension of time: just and equitable

FIXED TERM REGULATIONS

Time limits. Employment Judge entitled to conclude that claims under **Employment Rights Act 1996** made 5½ years out of time should not proceed. Even if not reasonably practicable to present them within time, they were not presented within a reasonable time thereafter.

However, in rejecting a claim under the **Fixed-Term Employees Regulations 2002** on the basis that it was limited to a victimisation claim under reg. 6 the EJ overlooked a potential complaint under reg. 3.

The question of just and equitable extension under reg. 7(3) remitted to same EJ for determination.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. This is a case about time limits. The parties are Dr Stephens, Claimant, and Kingston University Higher Education Corporation, Respondent. This is an appeal by the Claimant against the reserved Judgment of Employment Judge Hyde, sitting alone at the London South Employment Tribunal following a PHR held on 20 June 2012, dismissing his various complaints under the **Employment Rights Act 1996** ("ERA") on the basis that they were time-barred and striking out a separate complaint under the **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("**the 2002 Regulations") in circumstances to which I shall return. That Judgment with Reasons was promulgated on 27 July 2012.

The facts

2. The Claimant commenced employment with the Respondent in September 2004. On 1 February 2005 he was appointed Senior Lecturer and MA Course Director in Creative Writing on a six-month fixed-term contract, later renewed for ten months ending on 31 May 2006. The contract expired on that date. It follows that, as a matter of law, he was then dismissed within the meaning of section 95(1)(b) ERA.

3. Prior to his dismissal, the Claimant raised a complaint of harassment by his line manager, Meg Jensen. That complaint, on his case, was not investigated by the Respondent.

4. The Claimant had spent virtually all of his career outside the UK. The Employment Judge accepted the Respondent's concession that at the effective date of termination the Claimant was not aware of Employment Tribunals and the time limits which applied (Reasons, paragraph 26).

5. On 17 August 2006 the Claimant consulted the Kilburn CAB about his position. They were not able to deal with his enquiry at that stage. In a subsequent review application to the Employment Tribunal the Claimant said that he relayed all of the essential details of his employment at Kingston University to the CAB. The review application was summarily rejected by the Employment Judge on 25 September 2012.

6. The three-month primary limitation period for all his claims expired on 30 August 2006. The CAB were not able to arrange an appointment for him to receive advice until 15 September 2006. The Judge found (paragraph 36) that on that date he then had a discussion with a case worker at the CAB and produced notes of his discussion. Those handwritten notes show that he discussed the matter with someone whom he later described as a "QC specialising in employment law" but whose name he may not have there accurately recorded. The advice, given over the telephone, was that the Claimant may have a civil claim under the **Protection from Harassment Act 1997**, something on which the lawyer claimed to have advised the House of Lords. The Claimant was told that the time limit for that claim was six years and that he should assemble his harassment case. On the Claimant's account he was not advised of any possible claim in the ET nor the time limits for bringing such claims.

7. In January 2012 he was first informed by a different legal adviser of the possibility of bringing a claim of unfair dismissal and protected disclosure detriment. He was told that failure to renew a fixed-term contract amounted to a dismissal. He received further advice on 28 February 2012 and then presented his form ET1 to the Tribunal on 5 April 2012.

The ET decision

8. It was common ground that the form ET1 was presented some five-and-a-half years out of time. The questions for the Employment Judge at the PHR were:

(1) Could the Claimant rely on the just and equitable provision for extending time contained in regulation 7(3) of the 2002 Regulations?

(2) Could the Claimant show, under section 111(2) ERA that, it was not reasonably practicable to present the ERA claims within the three-month primary limitation period and, if not, whether they were presented within a reasonable period following expiry of the primary limitation period on 30 August 2006?

9. The Judge answered those questions as follows. First, as to the claim under the 2002 Regulations, she held that the only claim raised by the Claimant was effectively one of victimisation under regulation 6 and that since he had not alleged a relevant protected act for that purpose the claim under the Regulations necessarily failed. It was therefore struck out (see paragraph 14) without the Judge going on to consider whether time should be extended under regulation 7(3).

10. As to the reasonable practicability escape clause under s.111(2), she held that, contrary to the Claimant's contention, he was not misled by the Respondent as to whether or not he had been dismissed by the non-renewal of his limited term contract on 31 May 2006 (see paragraph 41); that, having acted reasonably in making enquiries of the CAB and not being told about Employment Tribunals and the time limits he was not reasonably ignorant of those time limits; see **Wall's Meat v Khan** [1979] ICR 52 and **Marks & Spencer plc v Williams-Ryan** [2005] ICR 1293, both Court of Appeal, to which the Judge was referred (see paragraph 42), and further, the considerable period of time which had elapsed since the dismissal was also relevant, inevitably offering the Claimant further opportunities to have sought advice about his

position (paragraph 43). In these circumstances the Judge found that the Claimant had not shown that it was not reasonably practicable to present his ERA claims within time; alternatively they were not presented within a reasonable time thereafter. She refused to extend time (paragraph 44).

The appeal

11. The Notice of Appeal drafted by the Claimant in person was initially rejected on the paper sift by HHJ Birtles under EAT rule 3(7). However, at a rule 3(10) Appellant only oral hearing held on 15 May 2013 I was persuaded by Ms Stout of counsel, appearing under the ELAAS Scheme on behalf of the Claimant, that the appeal was reasonably arguable on the basis of amended grounds of appeal which she settled. Today Ms Stout again appears on behalf of the Claimant pro bono and I have had in addition the advantage of full argument by Ms Iris Ferber of counsel on behalf of the Respondent. Having considered the rival submissions, my conclusions are as follows.

12. Dealing first with the claim under the 2002 Regulations it is common ground before me that the Judge fell into error in confining her consideration below to a claim under regulation 6. Ms Ferber realistically accepts that the Claimant raised a potentially viable claim under regulation 3, namely that he was subjected to detriment as a fixed-term employee when compared with a permanent employee by the way in which his internal complaint of harassment was dealt with by the Respondent. It is plain that the Employment Judge did not consider such a claim, limiting her consideration to a victimisation claim under regulation 6. The two provisions, regulations 3 and 6, are of course quite different.

13. It therefore follows, as Ms Ferber acknowledges, that the Judge was wrong not to consider the regulation 7(3) just and equitable question in relation to the Claimant's

regulation 3 complaint. As to how that omission should be remedied is a matter to which I shall return when considering disposal of the appeal.

14. The appeal against the finding on the ERA escape clause is more problematic for the Claimant. The question of what is or is not reasonably practicable is essentially one of fact for the Employment Tribunal and this appellate tribunal should be slow to interfere with the exercise of discretion by this very experienced Employment Judge: see **Palmer and Saunders v Southend Borough Council** [1984] IRLR 119

15. Ms Stout puts her challenge to the Judge's conclusion not to extend time under s.111(2) in three ways: first, she failed to apply the liberal construction principle adumbrated by the Court of Appeal in **Williams-Ryan**, to which she was referred; secondly and cumulatively, she was wrong to fix the Claimant with a failure by the Kilburn CAB to advise him of potential ET claims and their time limits; and thirdly that she failed to consider and correctly apply the "skilled adviser rule", alternatively to give adequate, **Meek**-compliant reasons for finding that he did not present his ERA claims within a reasonable period following expiry of the primary limitation period.

16. In considering those contentions and the rival submissions of Ms Ferber, I begin with the law.

17. The "reasonable ignorance" approach, as it is described correctly at paragraph 42 of the Reasons, is founded in the Judgment of Brandon LJ in **Wall's Meat** as followed by Lord Phillips MR in **Williams-Ryan**; see paragraph 21. It is not enough that the Claimant is ignorant of his rights, as was the case here (see Reasons, paragraph 26). He must show that he

taken reasonable steps to acquire the necessary knowledge. Was he reasonably ignorant of his rights?

18. The Judge found that the Claimant acted reasonably in approaching the CAB during the primary limitation period. It is also apparent, on the Claimant's account which seems to have been accepted by the Judge, that he was not given advice on 17 August and when he spoke to the so-called employment law specialist on 15 September 2006 he was told nothing of any potential claim in the ET. What is the effect of the CAB involvement on the reasonable ignorance question?

19. In **Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53 at 61 Lord Denning MR suggested that a claimant who engages a skilled advisor who makes a mistake as to the time limit is out, his remedy lies against the advisor. And in **Riley v Tesco** [1980] ICR 323 it was thought that the Court of Appeal there held that in **Wall's Meat** the court had in turn held that a CAB was in the position of a skilled advisor. However, the approach of Lord Phillips to that line of authority in **Williams-Ryan** is illuminating; see paragraph 32. In summary, he concluded that the mere fact of obtaining evidence from a CAB cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application to the ET.

20. Ms Stout seizes on this observation by the Master of Rolls to submit that the Employment Judge here fell into error at paragraph 42 where she said this:

> **"The Tribunal had regard to the part of the judgment in the *Williams-Ryan* case where Lord Phillips MR said that it was necessary to consider 'not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances'. Here the Claimant acted reasonably in making enquiries of the CAB but did not obtain and discover the necessary information about Employment Tribunals and the time limits. Information about time limits should have been made known to him as a result of these enquiries. He was therefore not reasonably ignorant of the time limits."**

21. The nature of the error is there said to be that the Judge overlooked the possibility that the person to whom the Claimant spoke on the telephone on 15 September 2006 was not a skilled advisor, in the sense identified by Lord Denning in **Dedman;** in that case the advisor was a solicitor who negligently missed the deadline for lodging Mr Dedman's claim.

22. I cannot accept that submission. The material before the Employment Judge (no oral evidence was heard) included the Claimant's own note of that discussion and its reference, if not to a QC, then to an employment lawyer who plainly ought to have advised him of the possibility of lodging a claim at the ET, albeit that it was then some two weeks out of time.

23. On those facts I would respectfully adopt the approach of Underhill J (President) as he then was in **Northants CC v Entwhistle** [2010] 740, to which Ms Ferber referred me. At paragraph 11 the former President said:

> **"In my judgment it must follow that it was reasonably practicable for the Claimant to have brought his claim in time. The burden of the *Dedman* principle is that in a case where a claimant has consulted skilled advisers the question of reasonable practicability is to be judged by what he could have done if he had been given 'such [advice] as they should reasonably in all the circumstances have given him': see the judgment of Brandon LJ in the *Walls* case quoted at para. 5 (3) above. It necessarily follows from the finding of negligence that Mr Lee did not give the Claimant the advice which he should reasonably, in all the circumstances, have given him."**

24. Thus, even if it was not reasonably practicable for this Claimant to bring his ERA claims within the primary limitation period it was reasonable for him to do so on or shortly after 15 September 2006 had he been given the advice he should have been given on that date. Instead the claim was lodged on 5 April 2012. The Employment Judge was entitled to find, applying the second limb of the s.111(2) test, that that was not within a reasonable further period of time following expiry of the primary limitation period. That alternative conclusion (see paragraph 44) is a permissible one, applying a liberal construction to the statutory

provision. Sufficient reasons for that conclusion (see in particular paragraph 36) are provided for that determination. It follows, in my judgment, that this part of the appeal fails and is dismissed.

Disposal

25. It follows that I shall allow the appeal solely in relation to the issue as to whether it is just and equitable to extend time under regulation 7(3) of the 2002 Regulations for the purposes of the Tribunal entertaining the regulation 3 claim.

26. During discussion this morning it became common ground between counsel that that issue should be remitted to the ET. It raises factual questions which I cannot determine. The issue between them is whether it returns to the same or a different Employment Judge.

27. Ms Ferber contends for the former. She has taken us through the principles adumbrated by Burton J (President) in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, paragraph 46 and approved by the Court of Appeal in **Barke v Seetec Business Technology Centre Ltd** [2005] IRLR 633 and submits that all the requirements for remission to the same Tribunal are made out.

28. Ms Stout, to the contrary, argues that since this decision was reached 18 months ago, that the Judge has taken a firm view against the Claimant and no evidence was heard, the case, which will take only day in either event, should go to a different Employment Judge.

29. I have concluded that the matter should, if practicable, be remitted to Employment Judge Hyde. She heard the case and is familiar with it. Her only error, in my judgment, was to light on a claim under regulation 6 of the 2002 Regulations instead of also

considering regulation 3, a claim which may not have been formulated with the clarity it has been on appeal. She should complete the task of deciding the just and equitable extension question. That raises a quite different question from the reasonable practicability issue. I have in mind the difference in approach to the question of bad advice; see, by way of example, **Chohan v Derby Law Centre** [2004] IRLR 685, particularly paragraph 16, per HHJ McMullen QC.

30. Accordingly the appeal is allowed in part. The issue under regulation 7(3) of the 2002 Regulations is remitted to the same Employment Judge, if practicable, for determination.