Appeal No. UKEAT/0159/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 September 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

EBAY (UK) LTD — APPELLANT

MISS T BUZZEO — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ALICE MAYHEW (of Counsel) Instructed by: Hogan Lovells International LLP Atlantic House Holborn Viaduct London EC1A 2FG
For the Respondent	MISS T BUZZEO (The Respondent in Person) & MS ANNA MACEY (of Counsel) Free Representation Unit

SUMMARY

UNFAIR DISMISSAL - Claim in time – effective date of dismissal – reasonable practicability

The Employment Judge erred in law in her approach to the question of reasonable practicability – in particular, failing to make necessary findings as to whether advice received by the Claimant from solicitors as to the date of expiry of the time limit was or was not negligent. **Northamptonshire County Council v Entwistle** [2010] IRLR 741 – and the many authorities there summarised – applied.

The Employment Judge did not make a finding as to the effective date of dismissal, assuming without deciding that the effective date of dismissal was more than 3 months prior to the issuing of the claim form. On remission such a finding would be essential: it was not self evident that the effective date of dismissal was more than 3 months prior to the issuing of the claim form.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by eBay UK Ltd ("eBay") against a judgment of Employment Judge Hyde dated 23 January 2013. By her judgment the Employment Judge held that the Tribunal had jurisdiction to determine complaints of breach of contract and unfair dismissal which Miss Buzzeo had brought against eBay. Today Ms Alice Mayhew appears for eBay, as she did below. Miss Buzzeo represents herself, but she has had considerable assistance from Ms Anna Macey, under the auspices of the Free Representation Unit, who has prepared a skeleton argument on her behalf and assisted her.

The background facts and issues

2. Miss Buzzeo began working as part of a team within eBay with effect from 13 September 2010. It is her case that she was employed by eBay. She says that her position was embedded within eBay, she corresponded with eBay prior to the appointment, she was interviewed by eBay and welcomed to its team. eBay's case is that it had no contract with Miss Buzzeo at all. It says that she had no more than a contract for services with an organisation known as Helm, described in its email offer as "our outsourcing partner". It is, however, noteworthy that the email offer says that she will be "paid via" Helm and that contract documentation for Helm was provided only in October 2010 after she had accepted eBay's offer and begun work. At all events Miss Buzzeo worked at eBay from 13 September 2010 onwards as part of a team, while invoicing Helm and being paid by Helm in accordance with contract documentation that purported to show that she was engaged under a contract for services.

3. On 30 March 2012 eBay's Mr Hoole told Miss Buzzeo in a telephone conversation that her services were no longer required and that she would be getting one month's notice. He told her not to do any more work from that point. On 6 April 2012 Helm gave Miss Buzzeo an email purporting to terminate its agreement with her. The email stated that the termination date would be 5 May 2012. I will quote:

> **"Hi Terri,**
>
> **I have been informed by our client eBay that they wish to terminate your contract, and in line with the terms in your contract I am giving you from today one month's notice of a contract termination. So, your Helm contract will end on May 5th 2012."**

4. Miss Buzzeo's claim form was submitted on 30 July 2012. If the effective date of termination was 30 March or earlier, it was out of time. eBay contended that the effective date of termination was 29 or 30 March; she contended that it was 5 May 2012, in line with the email.

5. Although Miss Buzzeo had completed the claim form herself, she had taken some advice from solicitors. They had told her that she had three months from 5 May 2012. She says that this was in any event her own understanding. It is also relevant to mention that Miss Buzzeo was unwell with pregnancy-related illness during at least part of the three-month period between April and August.

The Tribunal's reasons

6. Two issues were listed to be determined at a Pre-Hearing Review: (1) the Claimant's contractual status; and (2) whether the Claimant's claim had been brought in time. The Employment Judge determined only the latter issue and, as I shall explain, determined that issue only in part. The Employment Judge's essential reasoning appears in the following passage:

"14. The time limit that applies in cases such as this is three months from the date of termination assuming a Claimant is an employee unless the Tribunal finds that it was not reasonably practicable for the Claimant to have complied with that time limit in which case the Tribunal can extend the time limit for such further period only as it considers reasonable: section 111 of the Employment Rights Act 1996.

15. It was clear to me here that the Claimant's advisers relied on the date in the e-mail from Helm; and that the Claimant then relied on the information that she was given by her advisers as to when the time limit expired. There is however ample case law although no specific case was referred to by the Respondent that it is not reasonable for a Claimant to get the date wrong based on erroneous legal advice.

16. I was satisfied given the Claimant's consistent position about this that she was told directly by Mr Hoole on 30 March that her services were no longer needed as from that date and that she need not work her one month's notice. There was debate about when the one month period expired. The Respondent's case was that the notice period expired on 29 or 30 April 2012 and therefore the claim was one or two days out of time.

17. The Claimant effectively left this point for the Tribunal to decide but relied on the point about taking her solicitor's advice. She also pointed to the fact that she was suffering from severe morning sickness for the first 14 weeks. I was shown a GP's letter which confirmed this. Her condition at that time apparently necessitated attendance at the Accident & Emergency Department of a hospital in the period May to July 2012.

18. The point was made on the Respondent's behalf that there was no corroboration of the Claimant's case that she was bedridden during this period as she maintained and it was certainly clear that the Claimant was able to take instructions in the early stages in early April from her solicitors about her case and then that she kept in contact with them throughout the ensuing months.

19. I considered however that this was relevant background to the question of whether it was reasonably practicable for the Claimant to have presented her claim within the three month period. I also considered the other point about the effect of a lay person as the Claimant was, albeit she had legal advice, receiving the 6 April 2012 e-mail in the terms that I have already quoted. I concluded that the Claimant reasonably believed that she had until 4 August 2012 to present a claim i.e. one month's notice from 6 April to 5 May and then three months thereafter. As already noted it was not clear what termination date was communicated to the Claimant.

20. Given the limitations of a preliminary hearing I reached these conclusions on the evidence as best I could. The combination of the circumstances referred to above led me to conclude that it was not reasonably practicable for the Claimant to have presented her claim within three months of the effective date of termination if you take it as 29 April 2012. She served her claim form on 30 July and albeit that it was towards the expiry of the time limit that she believed applied to the circumstances I was satisfied that that was a reasonable time beyond the expiry of the time limit. Thus I extended the time limit to 30 July 2012."

Effective date of termination

7. It is to my mind plain from the Employment Judge's reasoning that she did not actually make a finding as to the effective date of termination; rather she dealt with the case on the footing that even if the effective date of termination was on or before 30 April, the claim was still in time. On behalf of eBay, Ms Mayhew submits that the Employment Judge was bound on the facts to hold that the effective date of termination was on or before 30 April. She says

that Mr Hoole gave one month's notice to terminate the contract on 30 March, the notice took effect from the following day (see **West v Kneels Ltd** [1986] IRLR 430) and therefore it expired at the latest on 30 April.

8. I do not accept that the Employment Judge was bound so to hold. To my mind, careful findings were required, for the following reasons.

9. Firstly, it is not plain and obvious that Mr Hoole was intending to give notice there and then himself. The Employment Judge described him as saying in the telephone conversation that Miss Buzzeo "would be getting one month's notice". One might expect a large organisation to give notice in a formal way. Indeed, a formal notice was given a few days later. If Mr Hoole was doing no more than saying that she would be getting formal notice, then the effective date of termination would be provided by the formal notice. There is no clear finding on this point by the Employment Judge.

10. Secondly, to my mind it is artificial to decide the effective date of termination point without deciding the nature of the contractual relationships involved. If, as eBay contends, it had no contract with Miss Buzzeo, then Mr Hoole had no business giving notice at all (but of course eBay will be successful on the contractual issues). If, as Miss Buzzeo contends, Helm were being used effectively as an intermediary and agent of eBay, then one might have supposed that Mr Hoole would expect Helm to give the notice, as it actually did, and that the notice would provide the effective date of termination.

11. For today's purposes I need not and should not reach any concluded view on these questions; they are matters for the Employment Tribunal. It is sufficient to say that at Tribunal

level, in order to decide the effective date of termination, careful findings of fact will be needed, and it seems to me that the question may be bound up with contractual issues. Careful findings will also be necessary to determine those issues. It is not self-evident that contractual documentation whereby Miss Buzzeo gave services to Helm represented the reality of the situation.

Time limits

12. Section 111 of the **Employment Rights Act 1996** provides as follows:

> **"(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.**
>
> **(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—**
>
> > **(a) before the end of the period of three months beginning with the effective date of termination, or**
> >
> > **(b) within such further period as the tribunal considers practicable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."**

A similar provision applies to a claim for breach of contract (see article 7 of the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**).

13. There is to be found in the judgment of Underhill P, as he then was, in **Northamptonshire County Council v Entwistle** [2010] IRLR 741 a full and helpful summary of the authorities concerning the "not reasonably practicable" test, with particular reference to the position where a skilled adviser has been used by the Claimant; I gratefully adopt it:

> **"5. There has been a great deal of authority about the effect of the "not reasonably practicable" test and, in particular, about its application in circumstances where a Claimant has consulted skilled advisers who have failed to give him proper advice about the applicable time limits. The cases to which I have been referred are Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, Walls Meat Company Ltd v Khan [1979] ICR 52, Riley v Tesco Stores Ltd [1980] ICR 323, Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, London International College v Sen [1993] IRLR 333, Marks &**

Spencer PLC v Williams-Ryan [2008] ICR 193 and Ashcroft v Haberdasher's Aske's Boys School [2008] ICR 613. I will not attempt a full analysis of what those cases decide; the points relevant to the argument in the present case can be summarised as follows.

(1) Section 111 (2) (b) should be given "a liberal construction in favour of the employee". This was first established in Dedman. There have been some changes to the legislation since but this principle has remained: see, most recently, paragraph 20 in the judgment of Lord Phillips MR in Williams-Ryan, at page 1300.

(2) In accordance with that approach it has consistently been held to be not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit. This was first clearly established in the decision of the Court of Appeal in the Walls case, but see most recently paragraph 21 of Lord Phillips' judgment in Williams-Ryan and, in particular, the passage from the judgment of Brandon LJ in Walls there quoted, at pages 1300 to 1301.

(3) In Dedman the Court of Appeal appeared to hold categorically that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a skilled adviser, even if that adviser had failed to advise him correctly. Lord Denning MR said this at page 61 E-G:

> **"But what is the position if he goes to skilled advisers and they make a mistake? The English court has taken the view that the man must abide by their mistake. There was a case where a man was dismissed and went to his trade association for advice. They acted on his behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was 'practicable' for it to have been posted in time. He was not entitled to the benefit of the escape clause: see *Hammond v Haigh Castle & Co Ltd* [1973] ICR 148. I think that was right. If a man engages skilled advisers to act for him, and they mistake the time limit and present it too late, he is out. His remedy is against them. Summing up, I would suggest that in every case the Tribunal should inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the four weeks to pass by without presenting the complaint. If he was not at fault, nor his advisers, so that he had just cause or excuse for not presenting his complaint with the four weeks then it was not practicable for him to present it within that time. A court has then a discretion to allow it to be presented out of time if it thinks it right to do so, but if he was at fault, or his advisers were at fault in allowing the four weeks to slip by, he must take the consequences. By exercising reasonable diligence the complaint could and should have been presented in time."**

Lord Denning made a similar point in his judgment in the Walls case, at page 56 D-E. In his judgment in the same case Brandon LJ, after referring to the fact that a complainant could in principle seek to rely on ignorance or mistake about the time limit, said this, at pages 60-61:

> **"Either state of mind will further not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made *or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him* [my emphasis]."**

(4) In Riley, Stephenson LJ cautioned against treating Dedman as laying down a rule of law, observing that "every case must depend on its own facts": see page 329 C-D. In Sen Sir Thomas Bingham MR went further and questioned the rationale of the rule itself: see paragraph 16, at pages 335-6.

(5) However, in Williams-Ryan Lord Phillips reviewed the relevant authorities in some detail with a view to identifying whether it was a correct proposition of law that, as he put it at paragraph 24 (page 1301):

> **"…if an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the Employment Tribunal in due time. The fault on the part of the adviser is attributed to the employee."**

He concluded squarely at paragraph 31 (page 1303):

> **"What proposition of law is established by these authorities? The passage I quoted from Lord Denning's judgment in *Dedman* was part of the ratio. There the employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an Employment Tribunal."**
>
> **The passage from Dedman there referred to is part of the passage which I have set out at (3) above. I think it is clear that Lord Phillips was intending to confirm that what he elsewhere called "the principle in Dedman" is a proposition of law and, to that extent, to decline to endorse Stephenson LJ's observations in Riley, which he referred to as having been *obiter*, or Sir Thomas Bingham's doubts in Sen.**
>
> **(6) Subject to the Dedman point, the trend of the authorities is to emphasise that the question of reasonable practicability is one of fact for the Tribunal and falls to be decided by close attention to the particular circumstances of the particular case: see, for example, the judgment of May LJ in Palmer at page 385 B-F. I should refer also to the comment by Stephenson LJ in Riley, at page 334 D that:**
>
> > **"When judges elaborate or qualify the plain words of a statute by gloss upon gloss, the meaning of the words may be changed, the intention of parliament not carried out but defeated and injustice done instead of justice."**
>
> **Lord Phillips acknowledged this at paragraph 43 of his judgment in Williams-Ryan (see page 1305)."**

14. Later Underhill P clarified a valuable and important point. An adviser's failure to give the correct advice may itself be reasonable and, if so, will not in itself be a bar to a finding that it was not reasonably practicable to bring the claim in time:

> **"9. In my judgment the Judge was right not to read Lord Phillips' endorsement of the Dedman principle in Williams-Ryan as meaning that in no case where a claimant has consulted a skilled adviser and received wrong advice about the time limit can he claim that it was not reasonably practicable for him to present his claim in time. It is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice is itself reasonable. Waller LJ made this very point in Riley: see at page 336 B. The paradigm case, though not the only example, of such circumstances would be where both the claimant and the adviser had been misled by the employer as to some material factual matter (for example something bearing on the date of dismissal, which is not always straightforward). I note indeed that May LJ referred to "misrepresentation about any relevant matter" as a potentially relevant factor in paragraph 35 of his judgment in Palmer. He was not referring specifically to a case where the adviser as well as the employee was misled but I can see no difference in principle."**

15. Ms Mayhew's first submission is that the Employment Judge did not apply the line of authorities concerning the position of the skilled adviser. She submitted that the advice of the Claimant's solicitor must clearly have been negligent. If eBay was the employer, it would be inconsistent for the notice to come from Helm, and the Claimant knew that she had been given

notice on 30 March 2012 by Mr Hoole. Miss Buzzeo submits that the Employment Judge sufficiently considered the authorities and reached a conclusion that she was entitled to reach without any error of law within it.

16. Up to a point, I agree with Ms Mayhew's submission. The authorities show that if the failure to meet a deadline is due to the negligence of a skilled adviser such as a solicitor, then the solicitor's fault will defeat any attempt to argue that it was not reasonably practicable to bring the claim in time. The Employment Judge adverted to this point in paragraphs 15 and 19 of her reasons but never grappled with it. She made no finding as to whether the solicitor's advice was or was not negligent. Such a finding was essential; her failure to consider the point was an error of law.

17. I part company with Ms Mayhew's submission when she says that the solicitor's advice was clearly negligent. I have already said that if - as Miss Buzzeo contends and may well have told her solicitor - Helm was the intermediary through which eBay worked, then Miss Buzzeo and the solicitor may have thought that Helm's notice was in effect given on behalf of eBay, and this view may yet prove to be correct. Once again, careful findings of fact are required.

18. Ms Mayhew's second submission is that the Employment Judge wrongly treated as relevant background (1) the pregnancy-related illness and (2) Helm's email of 6 April 2012. Miss Buzzeo again submits that there is no error of law in the Tribunal's reasoning on these questions.

19. Again I agree with Ms Mayhew's submission up to a point. Pregnancy-related illness will only be relevant background to a finding that it was not reasonably practicable to bring the

claim in time if it in some way contributed to the fact that it was not reasonably practicable to do so. I cannot see from the Employment Judge's reasoning how it did so. On the face of it, Miss Buzzeo was able to consult a solicitor and bring a claim within what she believed was the correct time. So far as I can see from the reasons pregnancy-related illness had no impact on the time limit issue. If it had, the Employment Judge did not explain what it was. Miss Buzzeo has emphasised to me today the degree of her illness and says that her illness in fact would have made it difficult to her to put the claim form in within time. I simply do not see this point explained in the Employment Judge's findings and reasons.

20. Helm's email of 6 April 2012 was not background; it was foreground. There is no doubt that it was the date in this email that led Miss Buzzeo or her solicitors, or both, to think that she had until 5 August to bring her claim. The question of whether it was not reasonably practicable to bring the claim turned on this point and upon the question of whether her skilled adviser was negligent. I have already explained that this point was central to the case and required to be specifically addressed.

21. Ms Mayhew's final submission was that there is no evidence that Miss Buzzeo relied on the email on 6 April when calculating the time limit. She argues that Miss Buzzeo relied on her solicitor's advice alone. Miss Buzzeo says she always thought that her notice expired as set out in the email on 6 April; all the solicitor did in the course of a short consultation was to confirm what she already believed. On this question Judge McMullen QC called at relatively short notice for the Employment Judge's notes. The Employment Judge was away and has for entirely understandable reasons been unable to provide them. Since I have reached the conclusion that this matter must be remitted for rehearing in any event, I see no need to decide the point.

Conclusion

22. In these circumstances the appeal will be allowed. The time limit question will be remitted for rehearing. It is plainly just and convenient that the rehearing should take place along with the contractual issues by a different Employment Judge who can start effectively afresh. The Employment Judge in this case had a relatively short time listed for the hearing, and the Employment Tribunal should be careful to ensure next time round that there is an adequate time listing. I am inclined to think that that is two days. eBay has suggested to me today that it wishes to consider whether it is desirable to have a preliminary hearing at all or whether the whole matter could be dealt with at the same time. If it wishes to pursue that point, it should write to the Employment Tribunal, with a copy to Miss Buzzeo, so that the Employment Tribunal may consider the matter.