Appeal No. UKEAT/0411/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 October 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

PALLET ROUTE SOLUTIONS LTD APPELLANT

MR J MORRIS RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2013

APPEARANCES

For the Appellant	MR JAMES POTTS (Representative) Peninsula Business Solutions Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MS KERRY GARDINER (of Counsel) Instructed by: DWF LLP Solicitors 1 Scott Place 2 Hardman Street Manchester M3 3AA

SUMMARY

PRACTICE AND PROCEDURE

Appearance/response

Right to be heard

A Respondent submitted a response late (it was sent in what should have been good time, but was sent 2nd class and under stamped). A default judgment followed, but as to liability only. The Respondent was notified of the remedy hearing and told that it could take part. However when the day before the date of the hearing the Respondent's representative received a statement of the evidence the Claimant proposed to adduce at the hearing, and telephoned the Employment Tribunal, he was told that he could not take part since he was debarred from doing so in consequence of the response being late.

Held that where the rule spoke of not being "entitled to take any part in the proceedings" this did not mean that the Respondent could not do so if invited, and did not preclude the Respondent asking to be permitted to do so. In the circumstances of this case, he would almost certainly have been permitted or invited to participate, even if he could not insist on it as of right, and accordingly a material procedural irregularity had occurred such that the appeal would be allowed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. One of the problems to which the former Rules of Procedure, under Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**, gave rise was the effect of a respondent being late in responding to a claim. The repercussions of the Rules and how they interrelate one with another has troubled this court on a number of occasions. On each of those, the judgments demonstrated a palpable sense that the Rules were capable of working an injustice, and the Appeal Tribunal went to some lengths to avoid it. The injustice arises because rule 4 provided that a Respondent must present a response to a claim within 28 days of the day on which he was sent a copy. Time limits elsewhere in the Rules could be extended under rule 10(2)(e), but it is plain from rule 4(4) that the time for putting in a response could not be extended under rule 4 after the 28-day time limit had expired unless - and only if - an application had been made within the 28 days. That is because rule 4(4) provided:

> **"The respondent may apply […] for an extension of the time limit within which he is to present his response. The application must be presented to the Employment Tribunal Office within 28 days of the date on which the Respondent was sent a copy of the claim (unless the application is made under Rule 33(1)) and must explain why the Respondent cannot comply with the time limit. Subject to Rule 33, the employment judge shall only extend the time within which a response may be presented if he is satisfied that it is just and equitable to do so."**

2. Thus once the 28 days had expired then ordinarily – I shall come to rule 33 later – the respondent could not obtain an extension of time. Rule 8 then kicked in. It came as the first of two Rules under the heading "Consequences of a response not being presented or accepted". Rule 8(1) provided that if the relevant time limit for presenting a response had passed, an Employment Judge should, in circumstances listed in paragraph (2), issue a default Judgment to determine the claim without a hearing. Paragraph (2) read:

> **"Subject to paragraphs (2)(a) and (6) [neither of which applies here], those circumstances are when either—**

(a) no response in those proceedings has been presented to the Employment Tribunal Office within the relevant time limit […].”

3. By paragraph (3) of rule 8 it was provided that:

> **“A default judgment may determine liability only, or it may determine liability and remedy. If a default judgment determines remedy, it shall be such remedy as it appears to the employment judge that the claimant is entitled to on the basis of the information before him.”**

4. The second of the two Rules under the heading “Consequences of a response not being presented […]”, rule 9, provided:

> **“A respondent who has not presented a response to a claim […] shall not be entitled to take any part in the proceedings except to […].”**

And it listed a number of applications that might be made, which included an application under rule 33 for the review of default Judgments and an application under rule 35, which is a preliminary consideration of an application for review in respect of rule 34(a), (b) or (e).

5. Thus, pausing there, subject only to the impact of rule 33, if a respondent submitted a response late and had not asked within the period of 28 days for an extension of time, the rule was that an Employment Judge ***must*** issue a default Judgment which he ***might*** issue in respect of liability only, or both liability and quantum, and the Respondent was not entitled to take any further part in “the proceedings”.

6. If the Employment Judge hearing a case remaining subject to the 2004 Rules determines to issue a default Judgment in respect of liability only, it follows that there is still to be a hearing in respect of remedy: but the scope of the word “proceedings” is wide enough to, and on its ordinary meaning does, cover such a hearing. Therefore the effect, subject only to

rule 33, of a Respondent being at all late with submitting a response is that under these Rules he is not entitled to take any part in any remedy hearing.

7. Rule 33 is headed "Review of default judgments". It provided, so far as material, as follows:

> **"(1) A party may apply to have a default judgment against or in favour of him reviewed. An application must be made in writing and presented to the Employment Tribunal Office within 14 days of the date on which the default judgment was sent to the parties. The 14-day time limit may be extended by an employment judge if he considers that it is just and equitable to do so.**
>
> **(2) The application must state the reasons why the default judgment should be varied or revoked. When it is the respondent applying to have the default Judgment reviewed, the application must include with it the respondent's proposed response to the claim [where that has not been received by the Employment Tribunal Office] an application for an extension of the time limit for presenting the response, and an explanation of why Rules 4(1) and 4 were not complied with. […]**
>
> **(4) The employment judge may—**
>
> **(a) refuse the application for a review;**
>
> **(b) vary the default judgment;**
>
> **(c) revoke all or part of the default judgment;**
>
> **(d) confirm the default judgment […].**
>
> **(5) A default judgment must be revoked if the whole of the claim was satisfied before the judgment was issued […]. An employment judge may revoke or vary all or part of a default judgment if the respondent has a reasonable prospect of successfully responding to the claim or part of it.**
>
> **(6) In considering the application for a review of a default judgment the employment judge must have regard to whether there was good reason for the response not having been presented within the applicable time limit. […]"**

8. The power to review default judgments is distinct from the power contained in rule 34 for parties to apply for a review under rules 34 to 36. Rule 34 made that clear in its heading, "Review of *other* judgments and decisions" [emphasis added], thereby distinguishing between those judgments subject to rule 34 and default judgments which were expressly subject to rule 33.

9. Thus, where a default Judgment is issued in respect of liability only, in circumstances in which a Respondent has been late in submitting a response, the Judge under rule 33 will be concerned with the question of reviewing that Judgment. If he determines that it should not be revoked, it follows that remedy still remains to be decided. But here, on one reading of rule 9, the Respondent would not be entitled to take any part in the proceedings, and if those words "shall not be entitled to take any part in the proceedings" mean, in effect, "is disentitled from taking" or "shall not be permitted to take" any part in the proceedings, that means that in those circumstances he is debarred. The judgment as to remedy once made would then be subject to review under rule 34 because it was not a default judgment. Such a review is not an efficient procedure, because of its waste of time and resource, and its tortuous nature.

10. In **D&H Travel Ltd v Foster** [2006] ICR 1537 the Appeal Tribunal, presided over by Elias P, as he then was, considered a case in which no response had been entered within the 28-day time limit and a Tribunal chairman had issued a default Judgment in respect of liability. The respondent's manager, however, went to the subsequent remedies hearing. He produced a copy of a letter that he claimed to have sent to the Tribunal saying he had a defence to the claimant's allegations. The Tribunal chairman, though dubious as to whether the letter had actually been sent, decided that in any event, as it gave no explanation for failing to put in a response in time and did not identify the proposed defence, it did not satisfy the requirements which an application for a review of the default Judgment under rule 33 must do. In accordance with rule 9 he refused to allow the respondent to participate in the proceedings and awarded the claimant compensation. The respondent appealed. It was held that the chairman had assumed wrongly that unless the default judgment was set aside the respondent could play no further part in the proceedings, whereas he could have considered a review under rule 34 of the decision in respect of the remedy hearing, which had not been the subject of the default Judgment.

11. The fair inference in the circumstances was that the respondent wanted to play whatever part it could in the proceedings and it was in effect saying that the interests of justice required a review. It would, thought the Appeal Tribunal, have been proportionate and in accordance with the overriding objective to have allowed the respondent to participate; that would have involved no prejudice to the claimant, whereas there was obvious prejudice to the respondent in denying it that right. The judgment at paragraph 55 asked whether there was a route whereby in principle the respondent's representative might have been permitted to participate in the remedy hearing. Elias P, speaking for the Tribunal, observed:

> **"55. […] We think that there was, although we readily concede that the route is tortuous and highly artificial, at least in circumstances where the default judgment on liability stands.**
>
> **56. The route is this. As we have indicated, the only way in which a challenge can be mounted to a refusal not to accept a response where no default judgment is entered is through a review under Rule 34. So far as remedy was involved, there was no default judgment with respect to that and therefore nothing to set aside pursuant to Rule 33. So, a Rule 34 review was the only route. That presupposes that a response has been refused. It is true that no formal response had even been drafted or submitted, but we think that, in rejecting the review of the default judgment, the chairman must be taken to have also rejected an application to permit the late submission of a response. After all, the essence of a review of a default judgment is that the Tribunal is being asked to accept a response out of time. Had the response been accepted, then the default judgment would have been set aside. That refusal to allow a response could then itself be the subject of a review under Rule 34. Normally, that would require an application in writing, but there is an exception where it is made orally at the hearing where the decision that it is sought to review was made, Rule 35(2). That was the position here, at least if the representations by the Respondent's representative could realistically be seen as an application for a review.**
>
> **57. We think that they could. […]"**

12. At paragraph 58 the Tribunal made further observations about the artificiality; that the response for which permission would by this route be given would focus on liability, which by definition had been determined already by the default Judgment, rather than on remedy itself, and thus if the respondent had in this case been allowed to put in a response, it would not have been for its real purpose of setting out the employer's case to resist the claim but for the sole purpose of circumventing the effects of rule 9. Nonetheless, the Tribunal had no doubt that the interests of justice dictated that the representative should have been allowed to be heard if an

appropriate legal route could be found. Elias P. went on to add, at paragraph 63, between letters F and G at page 1,550 of the ICR report:

> **"If there were no way of enabling participation in these circumstances, then we think there would be a real question, as [the advocate for the Claimant] submitted, whether Rule 9 might be incompatible with Article 6 of the European Convention on Human Rights, but we need not explore that issue further, having concluded that there is a lawful, if artificial, route."**

13. An indication that other Tribunals have in similar circumstances sought an answer to the same effect in order to respect the interests of justice is indicated by the fact that Lady Smith in **Gem Weld UK Ltd v Mitchell** UKEAT/0053/07, a decision of 18 June 2008, adopted the procedure in **Foster**. The decision of **NSM Music v Leefe** [2006] ICR 450 by Burton J shows the same approach, as does the case of **Moroak t/a Blake Envelopes v Cromie** [2005] ICR 1226 (see paragraphs 19-21).

14. Having set out the law, I turn to the facts of this particular case. The ET1 was presented on 16 November 2011. It was not until 16 December 2011, therefore one day late, that the employer's response was received. The reason given for that was that the response, which was posted on 9 December, was posted second class, and it was under-stamped. The response was wholly inadequate to contest the claim that the Claimant had been unfairly dismissed. So, when a default judgment was entered and the Respondent sought a review of the default judgment under rule 33, that was refused. The default judgment, however, was in respect of liability only.

15. There then followed unfortunate events. A remedy hearing was fixed for 11 May. The Tribunal sent a notice to the Respondent telling the Respondent of the date, place and time of that hearing. The letter mentioned the possibility of applying for a postponement, asked the Respondent to indicate if there was sufficient time for the hearing and said:

> **"You may submit written representations for consideration at the hearing. If so, they must be sent to the Tribunal and to all other parties not less than seven days before the hearing. You will have the chance to put forward oral arguments in any case. It is your responsibility to make sure that your witnesses come to the hearing."**

It therefore said (despite the terms of rule 9) that the Respondent would be heard.

16. The Respondent then received the statement of the Claimant for the purposes of the hearing very late in the day. It was sent to it only at 4.52pm on the evening before. The Respondent's Mr Rowbotham, whose case it was to handle, did not read his emails until 6.30am the next morning. As HH Jeffrey Burke QC observed at the rule 3(10) hearing, there was no reason to suppose that he should be condemned for not reading them earlier as a businessman with his own affairs to attend to. When he saw that there was that statement from the Claimant with which he disagreed, he was immediately in contact with the Tribunal and asked the Tribunal to postpone the case. He got an answer back by email, which said that the Judge had refused his request "because the Respondent has no standing to take part in the remedy hearing". The result of that was, Mr Rowbotham asserted, that having intended to go along to the Tribunal he did not go. He was told there was no point in his going because he had no standing to attend. Otherwise he would have contested the Claimant's evidence about his attempts to obtain employment and some other matters in respect of remedy. In short, if it had not been for that communication, he would have gone; that communication, in effect, denied him by a pre-emptive strike of the opportunity of putting forward representations which he otherwise would have done.

17. To Judge Burke it appeared that there might be a route that would have permitted Mr Rowbotham to attend and make submissions which in turn meant that it was an error of law to tell him that he had no standing, because that meant that the procedures adopted worked

injustice, and to adopt an unfair procedure is an error of law. Judge Burke thought that it was possibly arguable that in the particular circumstances of this case the wording of rule 9 permitted Mr Rowbotham to take part. His focus was upon the opening words of rule 9. That refers to a respondent who has not presented a response to a claim. Judge Burke thought it was arguable, and Mr Potts argues, that here the Respondent had presented a response; it had simply been out of time. Secondly, he could argue that he was a Respondent whose client's response had been accepted, because it had been accepted, albeit erroneously, in the first place, by mistake of the Tribunal. It was only when that mistake was revealed that the default judgment issued in the first place.

18. Permission was limited to those two grounds. Underlying them was the same sense as in the case-law set out above that it was entirely just that Mr Rowbotham should be able to say what had to be said to ensure that the Tribunal did not over-compensate the Claimant, just as inevitably it should not under-compensate him.

19. The argument relied heavily upon **Foster**. However, in my view, if the argument envisaged by Judge Burke had been the only argument, it would have failed. Ms Gardiner, for the Respondent, points out that rule 9 cannot sensibly be interpreted to mean that if a Respondent presents a claim late, they are not to be subject to the restrictions in rule 9. "Presented" must mean, in context, "presented in time"; I accept this. The scheme of the Rules provides for consequences for being late in submitting a response. Those consequences cannot sensibly depend upon whether a Judge does his duty under rule 8 in issuing a default Judgment, and in any event the reference to a response not being accepted includes in rule 6(2)(b) that it should not be accepted if the response has not been presented within the relevant time limit. "Accepted" must, in context, mean "properly accepted". I do not therefore consider that either

of the two potential routes that Judge Burke threw out for consideration could succeed in showing that the Tribunal made an error of procedure.

20. However, at this Tribunal there was floated the idea that insufficient attention might have been paid to the wording of rule 9. As I have already pointed out, the expression "shall not be entitled to take any part" might be open to interpretation as forbidding the taking of any part. That is not, however, the language used. The language is that of entitlement; that is, a person who is entitled to take part in proceedings may insist upon his right to do so, and it would then be an error of law in all circumstances to deny him that right unless some other statutory provision had that effect. But rule 9 does not say that a respondent in such a position would not be permitted in any circumstance to take part. The notice of remedy hearing, in using the words, "You will have the chance to put forward oral arguments […]", though I suspect a pro forma document used for any remedy hearing, is, in my view, an accurate statement of the position if "chance" means, as it reads, a possibility that that might occur. On this view, the right to take part is extinguished, but not the power of the Tribunal to invite a respondent to do so, and that respondent is not then barred from participation.

21. In this case, there has been a decision to refuse a review under rule 33. In order for rule 34 – the **Foster** route, if I may call it that – to be adopted, there would either have to be the tortuous and artificial route identified by that Tribunal or a judgment would have to be made as to remedy which it would then be open to the respondent to seek to review under rule 34, upon the basis that it was in the interests of justice to do so, and thereby have standing to argue the point. The right would be a right actually under rule 35 because of the terms of rule 9(b), but it would lead, potentially, to rule 34, which might lead, if the review were granted, to a fresh look at and rehearing of the remedy hearing. As I have said, this is a lengthy, unwieldy way of

proceeding that it is difficult to think the draughtsman of the rules had in mind. It is also difficult to think that the draughtsman had in mind a party being excluded from any hearing on remedy if the default Judgment went only so far as liability, even though he would have the right to seek a review under rule 33 if it went so far as remedy, since this would seem to be a result that would prevent a party wishing to be heard from putting forward his case. I would be more emphatic even than was Elias P for the Tribunal in **Foster** in thinking that this potentially would offend Article 6 of the ECHR. Access to court is necessary if the rights to fair trial are to have any meaning, for without such access they cannot be enjoyed. A technical bar to access that has no proper justification and is not proportionate in the circumstances of the case should have no place.

22. For these reasons, I would adopt a linguistic interpretation of the word "entitled" that takes it no further than the word means in language construed strictly; if wrong in that, I would take the interpretative approach that I am enjoined to do under section 3 of the **Human Rights Act** in applying Article 6, because I consider it within the grain of the legislation, for the reasons I have expressed, that it should be so construed. In short, the route I would take, and do take, to the construction of rule 9 is that where a respondent has presented a response to a claim late, although he cannot claim as a matter of right that he must be heard in any further proceedings, he may ask to do so, or may be permitted to do so at any rate, by the Judge. Such a construction would avoid the necessity in general for the tortuous approach that otherwise might be adopted following **Foster**; it avoids the difficulty of there having to be a review principally concerned with liability but designed to have an effect in respect of remedy to which that decision gives rise, and it would leave the Tribunal Judge in any case to apply the overriding objective in deciding whether or not to hear what a respondent had to say, knowing

that he could, for good reason, decline to do so, since the respondent before the Tribunal would have no entitlement to take part.

23. This approach has been set out in writing as a proposed amendment by Mr Potts, for the Respondent. Ms Gardiner took instructions upon it; she submitted that it was too late in the day and therefore resisted it. Realistically, she accepted that it was closely related to the other grounds. She accepted that, taking a broad view of the appeal, it was seeking to say that precluding the Respondent saying anything by way of remedy was unfair and that that was well covered by the existing Notice of Appeal, even if somewhat unspecific in its terms. She accepted that there was no prejudice to the Respondent; it would not be proportionate for today's hearing to be adjourned. It did not add much to the second point of appeal.

24. Applying as I do the interests of justice generally, taking into account the time at which permission to amend was sought, but noting that an amendment may be made at any time, recognising the interests of justice and the absence of any real prejudice, I have concluded that the amendment should be permitted, and it is.

25. Since I have permitted that amendment, it follows from the reasoning that I have set out above that I think in these circumstances it should succeed.

26. On the facts as they appear to be, Mr Rowbotham would have attended the Tribunal had he not thought there would be no point in his doing so by reason of the Tribunal's mistake in considering him to have no standing at all. Had he attended, he would almost certainly have a strong, and, in my view, irrefutable, case to be permitted by the Judge to participate. For those reasons, it seems to me that there was an unfairness to the Respondent in the proceedings, and I

cannot say that the conclusion to which the Judge came on remedy would necessarily have been the same as it was.

27. The matters at stake financially are not high. I urge the parties to seek to conciliate their difference. There will formally be a remission to the Tribunal to consider the question of remedy. They will in doing so give proper consideration to whether Mr Rowbotham or whoever appears for the Respondent should be invited to participate so that the Tribunal may reach an appropriate and considered award that does proper justice between the parties.

28. Finally, and by way of postscript, the 2013 Regulations (SI 2003/ No.1237), which set out the new Tribunal Rules, provide, by rules 18, 19, 20 and 21 for the late presentation of a response. Without determining the matter, because no arguments have been addressed to it, I note that the Respondent shall be entitled to the notice of any hearings and decisions of a Tribunal, even where his response is made too late, but:

> **"[…] unless and until an extension of time is granted shall only be entitled to participate in any hearing to the extent permitted by the Judge."**

29. That is, on the face of it, much clearer, but it is very much to the same effect as is my view of what was the less forgiving rule in the 2004 Rules that has been the focus of this appeal.