Appeal No. UKEAT/0234/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 December 2012

Before

HIS HONOUR JUDGE PETER CLARK

MR P GAMMON MBE

MR B R GIBBS

MS G DE SOUZA APPELLANT

MANPOWER UK LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BRIAN IKEJIAKY (Representative) K M Legal Advisory Ltd 246-250 Berkeley Business Centre Romford Road London E7 9HZ
For the Respondent	MR ED WILLIAMS (of Counsel) Instructed by: Field Fisher Waterhouse LLP Solicitors 27th Floor, City Tower Piccadilly Plaza Manchester M1 4BD

SUMMARY

JURISDICTIONAL POINTS – Extension of time: just and equitable

Race discrimination claim lodged one day out of time. Employment Tribunal decided not just and equitable to extend time. No error of law in ET approach. Cross-appeal moot. Both appeal and cross-appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. The parties in this matter before the East London Employment Tribunal were Ms De Souza, Claimant, and Manpower UK Ltd, Respondent. The Claimant was employed by the Respondent as a recruitment consultant until her dismissal by a letter dated 24 April 2009. That letter stated that the reason for dismissal was redundancy, that she would not be expected to attend work during her notice period, and added, "You [sic] termination date will be 21st May 2009". By a form ET1 presented to the Tribunal on 21 August 2009 settled by Bowling & Co Solicitors and signed by the Claimant, she complained of unfair dismissal, protected-disclosure dismissal and detriment under the **Employment Rights Act 1996** ("the ERA claims") and unlawful racial discrimination. The ET1 gave as the date of termination of employment (EDT) 23 May 2009. By an amended response the Respondent took the point that the claims were lodged out of time. If the EDT was 21 May, the claims were one day out of time. A CMD order of 29 June 2010 recorded at paragraph 11.1 that the Respondent took both the limitation point and a point on the statutory grievance procedure.

2. Both those jurisdictional points came on for hearing before a full Tribunal chaired by Employment Judge Haynes on 28 February 2011. By a Judgment sent to the parties on 22 March that Tribunal held that all claims were out of time and that (a) the Claimant could not rely on the "reasonable practicability" escape clause in the ERA claims and (b) that it was not just and equitable to extend time for bringing the discrimination claim. Written reasons for that Judgment were given on 6 July 2011, and at paragraph 2 the Tribunal records that it was agreed between the parties that the Claimant could not rely on the three-month extension to the ordinary three-month limitation period under Regulation 15 of the **Dispute Resolution Regulations 2004**. Thus the grievance point fell away and, as Mr Williams acknowledged this

morning in argument, the Respondent's cross-appeal in relation to the question of grievance goes nowhere and we shall dismiss it at this stage.

3. The appeal brought by the Claimant does not challenge the Tribunal's limitation ruling in respect of the ERA claims but is directed only to the discrimination claim.

The facts

4. The Tribunal found the following facts material to the question of limitation in the discrimination claims. The dismissal took effect on 21 May 2009. Prior to dismissal the Claimant had consulted a solicitor. She saw the solicitor again in June 2009, shortly after she had received her form P45. Pausing there, the P45 is dated 31 May 2009 and gives her leaving date as 21 May.

5. At paragraph 4 of the reasons the Judge records the following evidence given by the Claimant:

> **"She told me that she was then advised she had a good claim. She sat with the solicitor and prepared a detailed form of claim and the detailed particulars upon which these proceedings are based. If that was the case, she must have gone into her case in very great detail, because it is very clearly pleaded in the Claim and was obviously prepared by someone with appropriate skills. She told me that the solicitor also advised her about the deadlines within which the Claim had to be filed. Because the Claimant had financial difficulties she did not agree for the proceedings to be sent to the Tribunal straight away. She wanted to think about things, especially the financial implications for her. Two aspects of this account concern me. Firstly, that the solicitor did not send a letter before action to the Respondent, which is usually the practice of solicitors, and secondly that he did not write a letter to the Claimant confirming his instructions. The Claimant specifically denied that either of these steps had been taken. I also note that the Claim refers to the dismissal having occurred on 23 May which is not correct."**

6. The Employment Judge on behalf of the Tribunal went on to doubt the accuracy of the Claimant's evidence, particularly evidence that she learned from the ACAS Guidance that she should await the conclusion of all internal procedures before issuing proceedings in the

Tribunal. The Judge was satisfied that no such advice was given by ACAS. Certainly, we would interpose, that is not the law (see **Apelogun-Gabriels v London Borough of Lambeth** [2002] IRLR 116 CA, expressly disapproving the EAT decision in **Aniagwu v London Borough of Hackney** [1999] IRLR 303, Morrison P). We note that in the case of **Virdi v Commissioner of Police for the Metropolis** [2007] IRLR 24 Elias P, was referred to the case of **Aniagwu** but not the case of **Apelogun-Gabriels**, which disapproved of the earlier EAT decision.

7. In the present case, the Claimant's grievance reached the final stage of the Respondent's procedure on 13 August 2011, and Mr Ikejiaky realistically acknowledges that whatever the status of a grievance procedure for the purpose of limitation it cannot be relied upon in the present case because the process had ended within the primary limitation period. At that point the Claimant's solicitor was on holiday, but she did not ask anyone else at his firm to deal with the matter. The Tribunal found that all that was needed was the posting of the draft form ET1 prepared back in June.

8. Based on these facts, the Tribunal dealt with limitation in the discrimination complaint at paragraph 11 thus:

> **"I then turn to the complaints of race discrimination. Under Section 68(6) of the Race Discrimination Act 1975 [sic] [Race Relations Act 1976] time can be extended if the Tribunal decides that it is just and equitable in all the circumstances of the case to do so. I have again considered the reasons given by the Claimant and have decided that I do not find it is just and equitable to extend time. I have not accepted the Claimant's explanation and it is not for me to decide what actually happened. I can accept that she was under great financial and other pressure at the time but not so great, according to her evidence, that she was precluded from taking the simple decision to tell solicitor [sic] to serve the Claim in the Tribunal. She had been aware of her right for over six months, she had taken expert advice and I can only speculate as to what the reason was that the claim was served one day late. I are [sic] not, in particular, convinced that it was because her solicitor was on holiday. I have applied the approach in *Keeble v British Coal Corporation* [[1997] IRLR 336]. I do not need to go through each of its provision [sic] in detail. I need to look at the basic test which is what the prejudice is to each of the parties if I either do or do not extend time. I find that there is no prejudice to the Claimant if we refused to extend time. The delay seems to lie squarely in her hands and her financial concern were [sic] the likely reasons for the delay. I do not find these are factors which are sufficient to persuade me to extend time. On that basis I find that it is**

not just and equitable to extend time. It follows that the complaints of race discrimination were also presented one day out of time and must be dismissed, because the Tribunal does not have jurisdiction to hear them."

The appeal

9. The appeal was originally rejected on the paper sift first under rule 3(7) of the **Employment Appeal Tribunal Rules** and later under rule 3(8) by Underhill J. However, at an oral hearing under rule 3(10), at which the Claimant was represented by counsel under the ELAAS pro bono scheme, HHJ Serota QC allowed the appeal to proceed to this full hearing on amended grounds settled by counsel then appearing.

10. At this full hearing Mr Ikejiaky, on behalf of the Claimant, has helpfully focussed on the issue in the appeal. Looking at the factors derived from section 33 of the **Limitation Act 1980** by Smith J, as she then was, in **British Coal v Keeble** [1997] IRLR 336, he concentrates on the first of those factors, namely the length of and reason for the delay in lodging the claim form. We agree that this is a relevant factor, applying the Court of Appeal guidance in **London Borough of Southwark v Afolabi** [2003] IRLR 220, affirmed in the more recent case of **Governing Body of St Albans Girls' School & Anor v Neary** [2010] IRLR 124, in the context of relief from sanction and the application of rule 3.9(1) of the **Civil Procedure Rules**. However, we are equally clear that this Tribunal fully took that feature into account, having directed itself (see paragraph 11) to **Keeble**. The finding was that, albeit the delay was only one day, the fault for that delay lay entirely with the Claimant. This was not a case of error by the advising lawyer (see **Steeds v Peverel Management Services Ltd** [2001] All ER (D) 370 and **Chohan v Derby Law Centre** [2004] IRLR 685, cited in **Virdi**, to which we were referred by Mr Williams); the fault lay entirely with the Claimant. No exceptional reason for the delay was made out (see **Robertson v London Borough of Bexley** [2003] IRLR 434). It is not for us

to substitute our view for that of the Employment Tribunal. Consequently, the appeal on this ground fails.

11. For completeness, we should deal with two further points. First, no explanation has been given as to why the form ET1 signed by the Claimant erroneously refers to the EDT as 23 May 2009. Certainly, there was no dubiety as to the EDT, as the letter of dismissal, form P45 and indeed paragraph 40 of the Claimant's witness statement show. Secondly, the reference to no prejudice to the Claimant in paragraph 11 is not understood. Plainly, every Claimant who does not receive an extension of time suffers the prejudice of not being able to pursue his or her claim. The answer may simply be that this was one of a number of typographical errors in paragraph 11 of the reasons, which we have quoted verbatim. Alternatively, upon a proper reading of the reasons as a whole, the Tribunal concluded that the principal factor tending against extending time was that fault lay entirely with the Claimant; that, rather than the balance of prejudice between the parties, determined the outcome.

Conclusion

12. In these circumstances, this appeal fails and is dismissed.