Appeal No. UKEATPA/1011/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 May 2013

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MR M ONUMAJURU — APPELLANT

NSL LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL FROM REGISTRAR'S ORDER

APPEARANCES

For the Appellant	MR A C EMEKA (Solicitor) Graceland Solicitors 15 Beresford Square Woolwich London SE18 6AY
For the Respondent	MS M SETTY (Solicitor) DWF LLP Bridgewater Place Water Lane Leeds LS11 5DY

SUMMARY

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

The law and practice on late appeals apply equally to a late appeal against the Registrar's refusal to exercise discretion to extend time. The time limit for such an interim appeal is five days. No reason was given in live evidence for the Claimant's one month delay. The substantive appeal had no merit whatsoever.

HIS HONOUR JUDGE McMULLEN QC

1. This is an appeal from the decision of the Registrar given by order on 12 September 2012 to refuse an application by the Claimant for an extension of time. The short history is that the Employment Tribunal, from which an appeal is sought to be raised, gave its decision with reasons on 16 May 2012, dismissing the Claimant's claims. The deadline for lodging an appeal, therefore, was 27 June 2012. A Notice of Appeal was received on that date but it was incomplete. The Claimant's solicitors were so informed and the missing information was provided to the EAT by the Claimant himself on 9 July 2012. The case manager of the EAT decided, on behalf of the Registrar, that the appeal was 12 days out of time. Therefore, the Claimant wanted to extend time, and did so. The Registrar rejected the application for reasons given on 12 September 2012.

2. On 9 October 2012, the Claimant sought to raise an appeal against that. The timescales, it will be recalled, are 42 days to lodge an appeal against the Employment Tribunal and 5 days to lodge an interim appeal against the Registrar's decision, so the Claimant's second appeal here on procedural grounds was about a month late, when it should have been within 5 days. The Registrar refused to extend time. The Claimant wishes to appeal against that.

3. The Claimant has been represented on the record by Graceland Solicitors, who appear through Mr Emeka today. The Respondent is represented by Ms Setty, Solicitor.

4. The legislation and the practice in relation to appeals from the Registrar have been the subject of about 20 judgments in the Court of Appeal on applications for permission to appeal against my judgments. None had succeeded. The most recent was the judgment of Mummery LJ in **Johnson v Ruck SSC Ltd** [2013] EWCA Civ 386, which upheld my

judgment, reviewing the law and the practice in this court (see UKEAT/1928/11) which I expressly incorporate into my Judgment here.

5. I have heard evidence from the Claimant on oath and on affirmation from his solicitor. A gulf has opened. I cautioned the Claimant about his rights on privilege, but a difficulty has arisen because Mr Emeka gives a different account of the reasons for lateness from that given by the Claimant. It was agreed at the outset that the issue for me was the reason to extend time to allow an appeal against the Registrar's order.

6. Notwithstanding my invitation to Mr Emeka and to the Claimant to deal with this matter, there has not been any satisfactory answer. The Claimant clings to the reasons why his original Notice of Appeal was late, which is to do with his not understanding what an ET1 an ET3 are, but all of those matters were resolved. The appeal was lodged in its complete form 12 days late. There was nothing more to do, therefore, but to consider whether extension of time should be granted as a matter of discretion. The Registrar considered all the relevant authorities and decided not.

7. The issue then is whether time should be extended in respect to the failure to meet the five-day rule. The rules that the Registrar cited for this are the same (see **Morrison**). I might myself have taken a slightly more flexible approach to an appeal that is already in the system, but this one was not, so I looked carefully at the material available to me. What the Claimant says is that he did not receive the Registrar's order and is missing his application for an extension of time to lodge the Notice of Appeal from the ET. His first written declaration about this appears in an email to the EAT sent on 8 October 2000 but deemed to be served on the 9th. This does not say anything about the reason he now gives, which is that he was not given a copy of the Registrar's order.

8. On 19 October, he sent an email which says for the first time that he was not aware of the Registrar's letter in September because no one informed him. In his witness statement for the purposes of today there is nothing about that, nor in the Skeleton Argument of Mr Emeka for today.

9. The evidence which I have heard is that the Claimant phoned the EAT and came to the EAT and was given a copy of the Registrar's order, and was also sent one in an envelope, which he has at home but which he has not brought. Thus, two copies of it exist in the Claimant's hands. He has produced neither. Mr Emeka's evidence is that he called his client again within the five days, told him the outcome, and Mr Emeka said he would go away, and he did not instruct Mr Emeka to make an appeal. Graceland remained on the record of the EAT, it seems to me for all purposes.

10. I have looked most carefully in the file where the case manager records all dealings with the Claimant, and although there is a record of the Claimant telephoning the EAT on 20 November 2012, there is nothing prior to that either by way of telephone or personal appearance. Mr Emeka says that his client informed him he had been to the Employment Tribunal, but that does no help for the Employment Appeal Tribunal.

11. A gulf has opened up and I prefer the evidence of Mr Emeka. I did not find Mr Onumajuru a convincing witness on this point. Had he telephoned the EAT as he said or come to the EAT, a record of it would be on the file, and it has not. He did not raise the lack of information in his original appeal from the Registrar about a month later. I do not accept his account. I accept Mr Emeka's account that the Claimant was advised of the outcome of the

Registrar's decision within five days, and Mr Onumajuru has only himself to blame. He could have instructed Mr Emeka to appeal, and he did not.

12. I stand back from this for a moment because it is unsatisfactory, I imagine, for the Claimant that we are focusing on the 5-day point. I have looked carefully at the reason why the substantive appeal was more than 42 days out of time. The Registrar correctly applied the relevant authorities. The documents were important and were missing. Indeed, the Judgment itself appears to be missing because it has not even appeared today, but no point is taken on that. The Claimant was represented at the relevant time, he could have obtained the documents from previous solicitors and I accept in full the Registrar's reasoning. There is no reason to exercise discretion as an exceptional case. However, as I say, it is not necessary for me to decide that, for the sole issue before me is whether I should extend time for the second appeal.

13. I make two further points. The original decision by the three-person Employment Tribunal was to dismiss the Claimant's claim. He was found to be a liar. The grounds of appeal consist of what are obviously mistaken references to what the Claimant says the judge (and I take it he means the three-person Tribunal) said about this. The grounds of appeal consist of only four paragraphs. The principal ground is to do with his allegation that he was whistle-blowing and that the Tribunal found that the disclosure that he had made was trivial. This is plainly not true. The Employment Tribunal did not consider that. However, the summary of paragraph 1 of the grounds of appeal is that the Tribunal made a decision contrary to the weight of evidence. That is not a question of law.

14. Paragraphs 2, 3 and 4 relate to what the Claimant says is new evidence. It consists of 35 pages. These were put before Employment Judge Sigsworth. He exercised his power to refuse

to order a review on the basis that this was not new material, it could have been produced in any event, and there is no separate appeal against the review.

15. The conclusion, therefore, is that this case has no merit. The merits were introduced in Mr Emeka's skeleton argument, and I asked him about that because it is his client's case that an injustice is being perpetuated in this case by the EAT insisting on technicalities, and that there is true merit in the case. In the exercise of discretion, it is occasionally proper to take account of the merits of the case (see the Judgment of Sir Christopher Staughton in **Aziz v Bethnal Green City Challenge Co Ltd** [2010] IRLR 111). Ms Setty does take the point that this case has no merit, having taken me through the Notice of Appeal, and so this is not a marginal case. This case has no merit whatsoever.

16. The second point is that I have, of course, made my own decision on the evidence I have heard today, but I do note there were very strong findings on credibility against the Claimant. I have no doubt that the decision that I have made is consistent with the impression given to the Employment Tribunal by the Claimant himself. For all those reasons, this application is dismissed.