Appeal No. UKEATPA/0260/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 July 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

LUTON BOROUGH COUNCIL APPELLANT

MR M HAQUE RESPONDENT

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	MR NATHANIEL CAIDEN (of Counsel) Instructed by: Luton Borough Council Legal Services Town Hall George Street Luton LU1 2BQ

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

Claim in time - construction of extension of time provisions under early conciliation regime - appeal permitted to proceed because need for clarity provided compelling reason for it to be heard (along with any other appeals raising the same point).

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. I am today concerned with the Respondent's proposed appeal from a Judgment of the Watford Employment Tribunal (Employment Judge Bedeau sitting alone on 12 January 2017; "the ET") sent out on 15 April 2017. Both parties were represented before the ET by counsel, though on this hearing under Rule 3(10) of the **EAT Rules 1993** I have heard from the Respondent, as Appellant, alone.

2. By its Judgment, the ET ruled that the Claimant's claims had been presented in time and should proceed to a Full Hearing. The Respondent seeks to challenge that ruling. Its proposed grounds of appeal were, however, considered on the papers by HHJ Richardson to disclose no reasonable basis to proceed. The Respondent having exercised the right to an oral hearing under of Rule 3(10) of the **EAT Rules 1993** the matter now comes before me. The test at this stage is for me to ask whether there is any reasonable basis for this appeal to proceed; that is, do the grounds for appeal identify any reasonably arguable error of law on the part of the ET or is there some other compelling reason for this matter to proceed?

The Relevant Background

3. The Claimant had been employed by the Respondent from January 2007. At the time of his dismissal on 20 June 2016 he was working as Housing Allocation Officer. The ET summarised the facts, relevant to the point before me, as follows:

> **"1. In a claim form presented to the tribunal on 18 October 2016, the claimant made claims of: unfair dismissal; direct race discrimination; indirect race discrimination; direct religion or belief discrimination; indirect religion or belief discrimination; and wrongful dismissal. In the response, presented to the tribunal on 9 December 2016, the respondent has denied the claims and asserts that they were presented out of time having regard to the ACAS conciliation provisions. The claimant was dismissed for either misconduct or for some other substantial reason, namely that the respondent reasonably believed that he was associated with a**

> **proscribed organisation, namely Al-Muhajiroun and he had failed to inform it that his brother in law had been convicted for being a member of that organisation."**

4. The preliminary point as to applicable time limits was raised by the Respondent and was set down for a Preliminary Hearing, and thus came before the ET. No evidence was heard but the ET recorded the following additional relevant information:

> **"10. The effective date of termination was 20 June 2016. The claimant went to ACAS on 22 July 2016 which was the date of notification. The early conciliation certificate was issued on 22 August 2016. There is no dispute that the three months' statutory time limit expired on 19 September 2016. The period of conciliation was 31 days. The claim form was presented, as stated earlier, on 18 October 2016."**

The Issue and the ET's Decision

5. The issue raised before the ET and on this appeal concerns identical provisions under the **Equality Act 2010** in relation to the Claimant's discrimination claims, the **Employment Rights Act 1996** ("ERA") in relation to his unfair dismissal claim, and the **Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994** relating to the wrongful dismissal claim. For convenience, I will refer to the provisions within the **ERA**.

6. By section 111 of the **ERA**, it is provided, relevantly:

> **"(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 reasonable 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.**
>
> **(2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a)."**

7. Thus section 207B of the **ERA** provides for the extension of time limits in order to facilitate conciliation before the institution of ET proceedings. It provides:

> **"(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant position").**
>
> **But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.**
>
> **(2) In this section -**
>
> > **(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and**
> >
> > **(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.**
>
> **(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.**
>
> **(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.**
>
> **(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."**

8. It was, and remains, the Respondent's primary contention that, as a matter of pure statutory construction, there are two different potential limitation dates. The first would be that provided by section 207B(3); in the present case, that would mean the extended time limit would be 20 October 2016, applying 31 days to the time limit that would otherwise apply, i.e. 19 September 2016. The second would be that provided by section 207B(4); which, in the present case, is said would be one month after the EC certificate was issued on 22 August 2016, i.e. 22 September 2016. As - the Respondent's argument continues - there cannot be two different time limits, it is the Respondent's case that subsection (4) must take precedence. The ET records the argument on this point (as presented before it), as follows:

> **"25. Mr Caiden further submitted that there cannot be two different time limits as one must have to take precedence. Sub-section 4, he argued, must be preferred over sub-section 3 as sub-section 3 is of a general nature whereas sub-section 4 is specific and mandatory as it states when the time limit would expire. As a matter of statutory construction, clear specific provisions, override general ones. He further submitted that sub-section 4 was the later provision and where there is conflict between the two statutory provisions, there is a principle that the later provision prevails (*Wood v Riley*). In other words, sub-section 4 should be preferred."**

9. Noting that this point had been taken but rejected in an earlier ET decision in **Booth v Pasta King UK Ltd** (15 October 2014) Leeds Employment Tribunal, Case number 1401231/2014, the Respondent argued that that case had been wrongly decided:

> **"27. Mr Caiden distinguished the first instance judgment in *Booth v Pasta King UK Ltd* Leeds ET 15.10.14 which found for a cumulative approach enabling the claimant to get a stop the clock new time limit then get a further extra month after day B. He submitted that such an approach is not only overly complicated but that the reasoning is not consistent with the statute. He gives four reasons for taking such a view. Firstly, paragraph 4.7 of the judgment relies upon the wording "relevant provision" as having several different meanings, when ordinarily a phrase used in the statute has the same meaning.**
>
> **28. Secondly, paragraph 4.10 in the judgment appears to read down the statutory language, but there is no justification for doing so. It is sufficient for there to be the addition of a month to the usual time limit.**
>
> **29. Thirdly, this interpretation makes little sense for cases where day A or indeed reconciliation, is before time starts to run as the claimant is getting an addition to a clock that has not started and then getting a further addition of a month after day B.**
>
> **30. Finally, the judgment ignores the basic rules of construction that the specific provision overrides the general."**

10. The ET rejected those arguments, expressly adopting the reasoning and approach of the Leeds ET in the **Pasta King** case and approving the text at paragraph [290.01] *Harvey on Industrial Relations and Employment Law* in this regard:

> **"26. … "For the purpose of working out the expiry date of the relevant limitation period, the period beginning with the day after day A and ending with day B is not to be counted. Thus if, for example, a three month limitation period would ordinarily have expired on 31 March, and day A was 16 January and day B was 6 February, the period that would not be counted would be 21 days, that is from 17 January to 6 February inclusive, so that the revised expiry date would be 21 April.""**

11. Applying that approach to the present case, the ET held:

> **"27. In this case the effective date of termination was 20 June 2016, day A was 22 July 2016, day B was 22 August 2016, the ordinary time limit of three months expired on 19 September 2016. I do take into account the 31 days spent in conciliation and I have added that time to the ordinary time limit expiry date, namely 19 September 2016. The extended period was to 20 October 2016. As the claim form was presented on 18 October 2016, in my judgment all of the claims were presented in time. Accordingly, the claimant will be allowed to pursue his claims in the final hearing."**

The Appeal, Submissions, Discussion and Conclusions

12. The main focus of the Respondent's appeal is the point taken before the ET below. It also argues that the ET was wrong to follow the Leeds ET in the **Pasta King** case, first, because

A an ET is not a Court of record and the doctrine of precedent does not apply between separate ETs, but also because the **Pasta King** reasoning does not fully engage with the way in which the Respondent is putting the point in this case.

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13. The first of the latter points is, I am satisfied, a bad point. The ET here was entitled to adopt the reasoning provided by another ET decision; I do not read it as purporting to simply follow that reasoning because it considered itself bound by it - it was not the doctrine of C precedent that was being relied on by this ET, it was that it found the reasoning in the **Pasta King** case persuasive and did not see the need to replicate it in its own decision. There is no error of law in adopting that approach.

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14. I note what the Respondent says as to whether or not the ET properly engaged with its argument in this case, although it seems to me that that can only have any merit if its principal E argument is properly founded.

15. More generally, Mr Caiden has taken me to another ET decision, this time of the ET sitting in Exeter in **Savory and 58 Others v South Western Ambulance Service NHS** F **Foundation Trust and Another** (9 June 2017) Case Number 1400119/2016 and 58 others, in which the argument that the Respondent seeks to run on this appeal was found to be at least arguable (although it was ultimately unsuccessful). It is as yet unknown as to whether any G appeal is being pursued in that matter. The Respondent contends that its reading of the relevant statutory provision is reasonably arguable and the point is one that needs resolution and its appeal should thus be permitted to proceed to a Full Hearing.

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16. In considering its arguments on the papers, HHJ Richardson demurred:

> **"The argument in the Notice of Appeal is plainly wrong. I will take section 207B as an example, but the same reasoning applies to the cognate provisions in the Equality Act 2010 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.**
>
> **Section 207B(3) sets out a statutory direction which applies in every case. In working out when a time limit set by a relevant provision expires the period beginning with the day after day A and ending with day B is not to be counted. In this case, for example, the time limit for unfair dismissal would have expired on 19 September; but the period beginning after day A and ending with day B is not to be counted. That period is 31 days. Hence one adds 31 days to 19 September and the time limit expires on 20 October.**
>
> **Section 207B(4) does not apply in every case - it says so explicitly. It applies only where (apart from section 207B(4) itself) the time limit would expire during the period beginning with day A and ending one month after day B. That is not the case here. By operation of section 207B(3) the time limit expires nearly 2 months after day B.**
>
> **The argument in the Notice of Appeal involves reading section 207B(4) as if it said "apart from this section". It does not. It says "apart from this subsection". It is entirely plain on the wording of section 207B(4) that it does not in some mysterious way take precedence over section 207B(3).**
>
> **Nothing in *Commissioners for HMRC v Garau* is "binding authority" to the contrary. That case deals with a different point.**
>
> **I would add that the rationale behind section 207B(3) and (4) was well stated by Employment Judge Davies at paragraph 4.10 of *Booth v Pasta King*."**

17. At present, having been addressed by Mr Caiden at least on the headlines of his argument, I would tend to share HHJ Richardson's view. I am, however, concerned by what Mr Caiden tells me, to the effect that this is an argument that is increasingly being taken before ETs and informing the advice given, for example by CABs. Mr Caiden contends that this provides a compelling reason for leave to be given for this matter to proceed: it is a point that needs to be clarified, after full argument at appellate level, sooner rather than later.

18. I note that in **Savory** there are three other cases cited said to be of some relevance on this question, one of which was the **Pasta King** case. If what Mr Caiden tells me is correct - and I have no reason to think that it is not, though I am not personally aware of this point having yet come before the EAT - then I can allow that there is a compelling reason for permitting this matter to proceed to a Full Hearing. At this stage I cannot say that I am otherwise persuaded of the merit of the underlying argument but I accept that I have done no

more than hear the Respondent's arguments essentially in bullet-point form, and allow that a Rule 3(10) Hearing is not the place to lay down definitive rulings on points that are apparently causing concern before ETs.

19. With some reluctance therefore, I direct that this matter should proceed to a Full Hearing, on grounds 3.1 and 3.3 (ground 3.4 is simply a matter of comment; I am not persuaded that ground 3.2 raises either any reasonably arguable point or shows any other compelling reason for this matter to proceed). I would also request - if at all possible - that this listing of this appeal be expedited and that this matter is heard together with any other appeals raising the same point (if there are any at this stage). I would also add the following observation: putting this matter through to a Full Hearing will (should he participate and be represented) involve the Claimant in costs; if ultimately the Respondent's argument is found (as HHJ Richardson suspected) to be plainly wrong, then the Respondent might not be surprised if it then faces a costs application.