Appeal No. UKEAT/0283/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 December 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

HIS HIGHNESS SHEIKH KHALID BIN SAQR AL QASIMI — APPELLANT

MS T ROBINSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPLICATION TO AMEND THE NOTICE OF APPEAL

APPEARANCES

For the Appellant	MR JAMES LADDIE (One of Her Majesty's Counsel) Instructed by: BP Collins Solicitors Collins House 32-38 Station Road Gerrards Cross Buckinghamshire SL9 8EL
For the Respondent	MR DAVID STEPHENSON (of Counsel) Instructed by: TMP Solicitors LLP 30th Floor 40 Bank Street Canary Wharf London E14 5NR

SUMMARY

PRACTICE AND PROCEDURE - Amendment

Application to amend the Notice of Appeal

During the course of the ET hearing of an application for interim relief in a whistleblowing case, the Appellant (the Respondent below) had raised a question relating to employment status. The ET had rejected this point and had gone on to find in favour of the Claimant on her application. After waiting for the ET's Written Reasons (the Judgment had been given orally at the end of the hearing) and having been advised by leading counsel, the Appellant lodged an appeal against the ET's Judgment but did not include any challenge to the finding on the employment status point. On the initial paper sift of the appeal, however, it was observed that this might have raised an arguable question of law. In any event, the appeal was permitted to proceed on other grounds and the matter set down for Full Hearing with an expedited time-table. Around a fortnight later, the Appellant applied to amend the Notice of Appeal to add a ground dealing with the employment status issue. The Claimant (the Respondent to the appeal) objected, observing that the application was opportunistic and the Appellant had unduly delayed; the Claimant contended that she was prejudiced and was not in a position to deal with the point at the appeal hearing, which would lead to yet further delay.

Held: *refusing the application*

Following the guidance provided in **Khudados v Leggate** [2005] ICR 1013 EAT, there was undue delay in raising the employment status issue as a potential ground of appeal (particularly given the nature of the underlying hearing and the expedited time-table before the EAT) and no satisfactory explanation. This prejudiced the Claimant and had the potential to give rise to yet further delay in the case and to impact upon the listing of other appeals and the efficient conduct of EAT business more generally. The application was refused.

HER HONOUR JUDGE EADY QC

1. I am today concerned with the Respondent's appeal from a Judgment of the London Central Employment Tribunal ("the ET"), sitting on 22 and 30 June 2017, which was sent to the parties on 26 September 2017. At the outset of the hearing of this appeal there is a preliminary application made by the Appellant to amend the Notice of Appeal, to add an additional ground, as follows:

> **"That the Employment Tribunal erred in law in failing to recognise that it was a precondition of it enjoying jurisdiction to make an order for interim relief under Employment Rights Act 1998 [sic], s.128, that the Respondent should establish that she was an employee of the Appellant. It was an error of law for the Employment Tribunal to proceed on the basis that it sufficed for the Respondent to demonstrate that she had a "pretty good chance" of proving her employment status."**

2. I should observe that both parties were represented by counsel before the ET; Mr Stephenson representing the Claimant (the Respondent to the appeal) as he does now, the Appellant (then the Respondent) appearing by different counsel.

3. During the course of the hearing before the ET, apparently rather late in the day on the second day of the hearing, counsel for the Appellant raised the jurisdictional employment status point that forms the subject of the present application to amend. This was apparently addressed in discussion between the Employment Judge and counsel for the Appellant and the point was decided against the Appellant for the reasons provided by the ET in its Judgment.

4. In submitting his original grounds of appeal, the Appellant did not seek to appeal against the ET's findings on this point. It is a matter that was only raised subsequent to the observations by The Honourable Mr Justice Soole, who, when considering this appeal on the initial paper-sift, commented as follows:

> **"Although not raised as a Ground of Appeal, it is not clear to me that the statutory requirement that applications are made by 'an employee' (s.128(1)) can itself be satisfied by the 'pretty good chance' test."**

Soole J was there referring to the test that is applied in interim relief applications.

5. In considering this application, I first remind myself that there is no right to amend a Notice of Appeal in the Employment Appeal Tribunal ("the EAT"): a party seeking to amend requires permission and there are procedural requirements laid down in the **EAT Practice Direction** in that regard. That said, I have a broad discretion as to whether or not to permit an amendment, and guidance as to how I should exercise that discretion was provided in **Khudados v Leggate** [2005] ICR 1013 EAT (His Honour Judge Serota QC presiding). Consistent with **Khudados**, it is relevant for me to consider: (1) whether the Appellant is in breach of a Rule or Practice Direction, in particular, the requirement that an application to amend should be made as soon as practicable or as soon as the need for an amendment was known; (2) whether the Appellant has given a full, honest and acceptable explanation for any delay; (3) the extent to which the proposed amendment would cause delay; (4) the balance of prejudice; (5) whether the proposed amendment raises a point of law which gives the appeal a reasonable prospect of success; and (6) the public interest in ensuring that business in the EAT is conducted expeditiously and that its resources are used efficiently. Whilst I should have regard to the overriding objective, which requires me to deal with cases justly, that does not mean that I should permit an amendment simply because it raises a good ground of appeal: justice requires fairness to all sides, to the interest of the public more generally, and to the efficient administration of the EAT's business; therefore the merits of the proposed amendment cannot be a determining factor.

6. Here, as I have noted, the ET's Judgment was given orally on 30 June 2017. The Employment Judge was aware that the recording equipment was not working properly and the parties were therefore asked to take note as the Judgment was given. The formal Judgment and Reasons were then sent out on 26 September.

7. The Notice of Appeal was only lodged on 3 November 2017; that is within the last week of the 42-day time period for an appeal. It appears to have then been expedited for sift and the initial on-paper consideration carried out by Soole J on or about 22 November 2017. That was when he made the observations I have already referred to.

8. The matter was otherwise set down for an expedited Full Hearing of the appeal, listed for a three-hour hearing today with the Notice of Hearing being sent out on 23 November 2017. It was about a fortnight later, on 6 December 2017, that the Appellant made this application to amend, contending that it should be permitted on the following bases:

> **"We do not consider that such an amendment will prejudice the Respondent [that is the Claimant] in the circumstances where:**
>
> **1. The Respondent will not be taken by surprise by these submissions - as explained above, the Appellant's Counsel specifically raised this point at the interim relief hearing on 30 June 2017 (and it was argued against by the Respondent's Counsel at that time), the point was referred to in the written reasons and [Employment Judge Stewart] highlighted the point in his Reasons. Further, we notified the Respondent's solicitor yesterday of our intention to rely on this argument at the 21 December hearing.**
>
> **2. The point raised by this amendment is very short and so will not make a meaningful difference to the length of the hearing; and**
>
> **3. The amendment raises a pure point of law and so there will be no need for the Respondent to provide evidence to argue against the point raised.**
>
> **Conversely, in the light of [Soole J's] comments in his Reasons, we consider that our client will be unduly prejudiced if the proposed amendment to the Grounds of Appeal is not permitted in the circumstances. Further, it would give the EAT the opportunity to provide clarification on a point of law for the future."**

9. Those acting for the Claimant responded on 8 December 2017, objecting to the amendment. First, it was observed that the point raised by the amendment needed to be seen in context: the discussion before the ET demonstrated that the jurisdictional point had been

explored in some detail and the ET's Reasons given at the end of the hearing needed to be seen against that discussion and the Appellant should properly have provided its note of that. Second, they pointed to the delay in the making of the application: in reality the point was being taken six months after the Appellant was aware of the ET's Judgment in this regard and after the Appellant had lodged a Notice of Appeal, drafted by experienced leading counsel. It was also being made after the Claimant's 'Respondent's Answer' to the appeal had been drafted (also dated 6 December 2017). Third, the application was opportunistic: it could be taken that the Appellant had taken a view as to the lack of merit of the point but was seeking to raise it after seeing Soole J's observations. Fourth, the amendment itself was raising a point said to go to the ET's jurisdiction, something the Appellant had apparently accepted without challenge for some six months. The risk was that the point raised had the potential to turn not only the interim relief application on its head but also the appeal itself, with the potential to prolong the litigation with further appeals to the Court of Appeal.

10. In addressing me on the application today, Mr Stephenson has further added that his client would be prejudiced if the amendment were allowed: he is not in a position to address the arguments today; the point had been raised at the eleventh hour before the ET, was raised late in the appeal process and at a time when there were continuing applications before the ET that his client had to deal with, and it was not fair on her to expect her legal team to be able to address the points at this appeal today.

11. Inevitably the way that the amendment application has been made suggests a certain degree of opportunism. The point was apparently only raised by the Appellant's counsel during the course of the second day of the ET hearing. It was then discussed in some detail and was addressed by the ET in its oral Judgment given that day. The parties were asked to take a note

of that Judgment as the dictation machine was not working and the final record provided by the ET was produced after the parties' notes (they were unable to agree a joint record of the Judgment) had been received. Given the urgency - it was an interim relief application - it might have been open to the Appellant to have lodged his appeal on the basis of an agreed note at an earlier stage, explaining to the EAT why he had taken that course. The Appellant chose not to do that, however, and he was, of course, entitled to wait for the ET's formal Judgment and Reasons. Adopting that course enabled the Appellant to seek out legal advice from new, leading, counsel and to reflect on whether or not he should seek to appeal against the ET's Judgment and, if so, on what basis. Even after the ET's Judgment and Reasons (wrongly described as "reserved") had been sent out, the Respondent did not rush to lodge an appeal but left it towards the end of the 42-day period. Again, that was his entitlement; just as he was entitled to reflect further on the merits of an appeal and the possible grounds.

12. Doing so, with the assistance of leading counsel, it was decided not to pursue the jurisdiction/employment status point. Mr Laddie QC has very fairly taken responsibility for that omission and in his skeleton argument has explained as follows:

> **"72.2. The reason for not including the ground in the original Notice of Appeal was that there was concern that the Notice of Appeal was already very full given the nature of the decision in issue and that it would not be proportionate to include this additional ground. I am content to acknowledge that the decision was my responsibility, and if it was an error, then the error was mine."**

13. I appreciate it is difficult for Mr Laddie QC to provide further detail of the explanation that might cause him to breach privilege, but it seems to me that a considered view must have been taken as to the merit of appealing the employment status point and it was determined not to do so; it is not said that the point was missed (which I would find difficult to believe, in any event) and it would, rather, seem to have been a strategic or tactical decision, taken after full reflection, with the benefit of expert legal advice.

14. Returning then to the questions relevant to the amendment application and, first, the issue of delay. It is apparent that there was a delay in this matter before the point was taken, even after it had been raised by Soole J; this was not a case where the amendment was raised at the earliest possible opportunity, notwithstanding the fact that the parties were operating to an expedited timetable. That is a relevant factor and I further acknowledge that it gives rise to a potential prejudice to the Claimant; she was already having to deal with this appeal within a very compressed time-table (there being around one calendar month between her receipt of Soole J's Reasons and this hearing) and did not have the same resources as might have been available to the Respondent. More generally, I accept what I am told by Mr Stephenson that, having had to deal with the matter on the hoof (so to speak) at the ET hearing, he does not feel in a position to deal fully with the point at this appeal hearing. If I were to allow the application to amend, he would feel professionally obliged to apply for an adjournment, which would inevitably give rise to further delay in this case (particularly unfortunate as it involves an interim relief application) as well as impacting on the efficient business of the EAT and on the potential listing of other cases.

15. More than that, it is not clear to me that I have had a fully satisfactory explanation for the delays that have arisen at various stages before the application to amend was made. I accept that there may be difficulties in offering a fuller explanation given the need to respect privilege but that is, of course, a matter for the Appellant, who is the party seeking to raise a late amendment to his appeal.

16. I also bear in mind that the point raised by the amendment might - if it has any merit - have implications for interim relief applications more generally. Inevitably it is, therefore, a matter that might - whichever way I decided the point - give rise to yet further appeals. That,

again, has an impact on the hearing of this matter and gives rise to further potential prejudice to the Claimant. In the circumstances, if the point was seen to have any merit, it was incumbent on the Appellant not to delay before raising it.

17. Taking all these factors into account, I consider this application must be refused.