Appeal No. UKEAT/0209/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 April 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

MR D BLEIMAN

MR T STANWORTH

TORRIDGE DISTRICT COUNCIL — APPELLANT

MR C CASWELL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES WIBBERLEY (of Counsel) Instructed by: Torridge District Council Legal Department Riverbank House Bideford Devon EX39 2QG
For the Respondent	MS ALISON GURDEN (of Counsel) Bar Pro Bono Scheme

SUMMARY

JURISDICTIONAL POINTS - Extension of time: reasonably practicable

JURISDICTIONAL POINTS - Extension of time: just and equitable

An Employment Tribunal erred in law in failing to provide adequate reasons for its permitting an extension of time in unfair dismissal and disability discrimination proceedings lodged over 16 months after the dismissal. No medical evidence had been provided, and the Employment Tribunal failed to address issues which had been in contention at the hearing.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this Judgment I shall refer to the parties as they were below. This is an appeal against the Decision of Employment Judge Matthews, sitting alone in Exeter on 29 June 2017, in which he held that it was not reasonably practicable for the Claimant's complaint of unfair dismissal to have been presented before the end of the period of three months beginning with the effective date of determination of his employment with the Respondent, but that the Claimant's complaint was thereafter presented within a period which the Judge considered reasonable; see section 111 of the **Employment Rights Act 1996**. He also found that the Claimant's complaints of direct disability discrimination and failure to make reasonable adjustments were brought within a period which he thought just and equitable; see section 123 of the **Equality Act 2010**. Against those Decisions the Respondent appeals.

2. The Respondent is represented today by Mr Wibberley of counsel who did not appear below, and the Claimant by Ms Gurden of counsel who appeared below on each occasion through the auspices of Bar Pro Bono Unit.

3. The background facts can be taken from the Written Reasons:

> **"5. Mr Caswell worked for the Council as an Animal Welfare Officer from 1 April 2002 until his dismissal on 29 July 2015.**
>
> **6. Following the suicide of his partner, Mr Caswell was absent from work from 13 April 2015 until 17 June 2015 endeavouring to cope with that event.**
>
> **7. On 25 June 2015 Mr Caswell was suspended from work. Mr Caswell did not return to work again but was dismissed around a month later on 29 July 2015.**
>
> **8. Immediately following his suspension Mr Caswell attempted suicide.**
>
> **9. Mr Caswell attended investigation meetings concerning the disciplinary allegations against him on 3 and 17 July 2015.**
>
> **10. Mr Caswell appealed against his dismissal in a letter dated 14 September 2015 (97). In numbered paragraph 8 of that letter Mr Caswell wrote: "I have sort [sic] legal advise [sic] and they inform me the whole case is full of discrepancies".**

11. In his evidence at this hearing Mr Caswell said that this was an untruth. He had not sought legal advice but, in writing what he had, he was trying to bolster his case. I accept that evidence.

12. In the event Mr Caswell did not attend the Appeal Hearing on 21 September 2015 but was represented by two social workers. The social workers excused Mr Caswell from the meeting on the ground that his mother was dying. Mr Caswell now says that he did not attend because he was mentally too unwell to do so. Whilst I do not consider it necessary to make a finding on this, Mr Caswell's absence could, understandably, be attributable to both factors.

13. Mr Caswell says that, following his dismissal, his mental health deteriorated further and he was prescribed medication accordingly.

14. During this period Mr Caswell spent much of his time in bed attended regularly by his mental health carer who was also on call. Mr Caswell says that he was unable to think about his dismissal.

15. By the spring of 2016 Mr Caswell was recovering to a degree. Eventually, through the agency of his local MP, Mr Caswell made contact with the Bar Pro-Bono Unit around June 2016. After financial and case assessment the Bar Pro-Bono Unit took Mr Caswell's case on 11 October 2016.

16. The Bar Pro-Bono Unit advised Mr Caswell to contact ACAS, which he did on 31 October 2016. ACAS issued a certificate on 15 November 2016.

17. The Claims were presented to the Employment Tribunals on 17 December 2016, some thirteen and a half months outside the "ordinary" time limits.

18. On 30 August 2016 Mr Terry Beverton (Recovery Care Coordinator with the Tawside Community Mental Health Services Team of the Devon Partnership NHS Trust) wrote to the Bar Pro-Bono Unit (116-117). In that letter Mr Beverton recorded Mr Caswell's mental health problems. The letter should be referred to for its full content. Commenting that the condition is likely to persist for some time, Mr Beverton describes symptoms of PTSD (although no diagnosis of it) and depression throughout the period in question and leading up to the date of Mr Beverton's letter.

19. Mr Caswell says that he was ignorant of the applicable time limits."

We note at this point that the letter referred to in paragraph 18 does not appear on its face to have been written by someone with any medical qualification.

4. Prior to the hearing on 29 June 2017, Employment Judge Emerton had, at a Preliminary Hearing, made an Order that the Claimant should provide documentary medical evidence relating to his medical condition at the time and subsequent to his dismissal relevant to his case that the medical condition caused or contributed to his failure to present his claim within the applicable time limit. No such evidence was in fact produced despite the Respondent having chased for it.

5. Having set out the applicable law, the Employment Judge set out his conclusions in the following terms:

> **"23. <u>The unfair dismissal claim and section 111 ERA</u>**
>
> **24. It is agreed that the "ordinary" time limit for presenting the unfair dismissal claim expired on 28 October 2015. On that basis it was considerably out of time.**
>
> **25. To be in time therefore, it is for Mr Caswell to show that it was not reasonably practicable for him to lodge the claim in time. If Mr Caswell succeeds in doing so I must decide whether or not the claim was presented within such further period as I consider reasonable.**
>
> **26. I am satisfied that Mr Caswell has shown that it was not reasonably practicable for him to lodge his claim in time.**
>
> **27. First, whilst I was concerned at the reference to legal advice in Mr Caswell's letter of appeal against his dismissal, I accept his evidence that there was, in fact, no such advice.**
>
> **28. Second and importantly, Mr Caswell's mental health problems were an insurmountable barrier to his lodging his claim, at least until June 2016 when he engaged with his local MP and the Bar Pro-Bono Unit. Thereafter the issue is whether or not the claim was presented within such further period as I consider reasonable.**
>
> **29. It took around six months from the first contact with the Bar Pro-Bono Unit for the claim to be presented. I am, however, satisfied that Mr Caswell continued to be unable to present his claim without assistance because of his mental health. The medical evidence supports this, at least until 30 August 2016.**
>
> **30. Thereafter I note that Mr Caswell engaged with ACAS but to no avail and his claim was finally presented on 17 December 2016. I consider that to be reasonable in all the circumstances.**
>
> **31. <u>The discrimination claims and section 123 EA</u>**
>
> **32. It is common ground that the "ordinary" time limit expired on 28 October 2015.**
>
> **33. In all the circumstances of the case I consider it just and equitable to extend time to allow these claims to continue.**
>
> **34. In doing so I have borne in mind that the onus is on Mr Caswell to convince me that time should be extended and that I must consider the prejudice each party would suffer as a result of the decision I reach.**
>
> **35. I have considered the length of the delay and the reasons for it. I am satisfied that the delay was caused primarily by Mr Caswell's inability to act because of his mental health.**
>
> **36. Whilst the Council will have to seek to re-establish contact with one of its principal witnesses to events (which witness has since left the Council's employment) I do not consider that the cogency of evidence will be affected by the delay.**
>
> **37. I am satisfied that, in light of his gradual and continuing recovery, Mr Caswell acted to pursue his claims as soon as his health permitted and there was no undue delay thereafter."**

6. The appeal was considered on the sift by The Honourable Mrs Justice Simler (President) who directed that the appeal should go to a Full Hearing with a Judge sitting with lay members.

7. In the briefest of terms, it is contended for the Respondent that the Judgment is wrong in law, inadequately reasoned and/or perverse. For the Claimant it is contended that the Employment Judge adequately set out his reasons and that this Appeal Tribunal should not interfere.

8. I now set out the grounds of appeal in more detail and how they were advanced. The first ground complains that the Employment Judge failed to address factors which were material to his decision. These included evidence produced by the Respondents in the form of Facebook postings as well as a failure to examine the role played by the Bar Pro Bono Unit, which the Respondent contends which was something which the Judge ought to have considered particularly in relation to the protracted delay - which I stress is not by anyone attributed to the Unit but as a "matter of fact" - between the Claimant first contacting the Unit and the eventual submission of his claim. Paragraphs 28, 29, 35, and 37 of the Reasons are relied upon in this regard. There is also mention by the Judge of mental health issues "*at least until 30 August 2016*" but not thereafter. The point that Mr Wibberley makes is that, having had assistance, was it reasonably practicable for the Claimant to have lodged his claim? The Judge, he says, fails to deal with the consequence of this.

9. The second ground asserts that it was an error of law to make a finding that it was not reasonably practicable and/or just and equitable in the absence of medical evidence. If there is no such factual reason underpinning a legal conclusion, it is asserted that conclusion has to fall away. The Respondents say that such medical evidence as the Judge relied was not fairly so described because Terry Beverton, the author, describes himself as a "Recovery Care Coordinator" and makes no reference to having any clinical qualification. Moreover, he deals only with matters to 30 August 2016. The letter makes clear at the outset that there has been a

diagnosis by an unnamed medical professional of "*mental health problems*", which, self-evidently, covers a wide spectrum.

10. The third ground of appeal asserts that, in the absence of any evidence - let alone medical evidence - and absent any finding that the Claimant was unable to present his claim after 30 August 2016, the Tribunal's decision that the claims eventually presented on 17 December were brought within a reasonable time was perverse and/or the conclusions reached were inadequately reasoned. In oral argument Mr Wibberley said that this was in effect ground 2 simply put in another way.

11. The final ground makes an assertion that the Tribunal erred in law and/or failed to give any adequate reasons for its approach in that such findings as the Judge made in relation to the Claimant's inability to act due to ill health, were necessarily limited to August 2016. Thereafter, he failed to address the lengthy periods which followed and to look for the individual points of delay. There is a further point that he failed to investigate let alone give reasons for his finding that a witness who had left the Respondent's employment would nonetheless be able to evidence. There is a conflict as to what evidence was before the Judge in this regard, but it was conceded today that the Respondent had not in fact tried to find this witness. We do not consider that this particular issue is one that we need concern ourselves with.

12. We are grateful for the skeleton arguments which had been put forward by both counsel and for oral arguments in support of those today. Mr Wibberley began his submissions by stressing correctly that this is a case in which the claim was not lodged until 16 and a half months after dismissal. This is therefore an exceptional case, he says, in its jurisdiction where -

as is common ground - time limits are expected to be adhered to. He made reference to two authorities. First, **Cullinane v Balfour Beatty Engineering Services Ltd** UKEAT/0537/10, which at paragraph 16 reads:

> **"16. … The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months. …"**

13. He also cited the judgment of Auld LJ in **Robertson v Bexley Community Centre** [2003] IRLR 434, where at paragraph 25 the learned Lord Justice said:

> **"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. …"**

14. A supplementary bundle has been put before us which contains material that was before the Judge. It includes witness statements made by the Claimant and certain Facebook posts. It is clear that it was put to the Claimant in cross-examination at the hearing; a number of questions were put as a challenge both to his credibility in relation to a period of time when he said he was unable to leave the house, and also in testing his subsequent claim still to be unable to submit a claim, but also to undertake other activities including the taking of a motorcycle test. Some of the pictures that are in the Facebook posts appear unlikely to have been taken at the date posted but others do not. It is not for us to evaluate these matters nor to resolve issues, which are plainly lies between the parties as to who said what at the hearing. The issue is that there was no indication as to what the Judge made of these points, which inevitably had a bearing on the credibility of the Claimant. In the absence of medical evidence, the Employment

A Judge was inevitably having to rely on the Claimant's own evidence as to his mental state over a protracted period.

B 15. Ms Gurden on behalf of the Claimant made the valid point that it is not for us to regard the Judgment as an examination paper. She says that Judge has plainly made a decision on the evidence and has given adequate reasons for that decision. She sets out in her skeleton argument as explanation for apparent shortcomings in the decision based on the fact that she C was present, an explanation as to what actually took place. She also told us that the Claimant's written statement was taken as read in the usual way and that he was questioned by the Respondent's representative and the Employment Judge for about 25 minutes.

D 16. Ms Gurden also helpfully explained to us the way in which the Bar Pro Bono Unit works; it is acting not as an advisory body, but rather as a conduit. There is, it seems, a series E of financial and merits tests which are applied before a case ultimately reaches a barrister willing to act. We wondered whether, given the very tight time limits in employment cases, applicants are given some form of warning or notification of the existence of such limits in the context of the time which it might take to process an application for assistance. Ms Gurden, F who is a volunteer whose services result from the process that the Unit undertakes and not an administrator, was not able to be certain about this.

G 17. We have concluded that this appeal must succeed. Having read the papers, it is evident to us that issues were raised at the hearing which were simply not addressed by the Employment Judge in his Reasons. In particular, the challenges put to the Claimant in cross- H examination and the absence of anything which could validly be described as medical evidence. Moreover, his Reasons give no explanation as to why he formed certain conclusions. In

particular, as to the period after June 2016 (prior to which date he found, at paragraph 28 of the Reasons, that the Claimant's mental health problems were an insurmountable barrier to lodging his claim), the Judgment fails to explain why after 30 August 2016 the Employment Judge was able to conclude that the Claimant's mental health was such to prevent him from presenting his claim without assistance. There is a fleeting reference to engagement by the Claimant with ACAS, which took place in October 2016, but again no explanation as to why, having been able to carry out other activities and indeed to engage with ACAS he was still not able to lodge his claim until 17 December 2016.

18. In our judgment and in the light of the authorities mentioned above, a full analysis is needed to be carried out in relation to each of the periods of delay involved and why the relevant finding was made. Simply to say that he was satisfied that the delay was caused "*primarily by Mr Caswell's inability to act because of his mental health*" (see paragraph 35 of the Reasons) is not compliant with the well-known dictum in **Meek v City of Birmingham District Council** [1987] IRLR 250, in which Bingham LJ summarised the duty of reasons in the following way:

> **"8. It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises …"**

19. In the light of this finding, which is one essentially of **Meek** non-compliance in relation to both the reasonably practicable and the just and equitable grounds to use shorthand, we do not consider it necessary to deal with the issues of perversity and prejudice.

20. Turning to disposal, we consider that this matter must be remitted to the ET for rehearing, regrettable though that is. Although ultimately a matter for that Tribunal, we would have thought it essential that proper medical evidence is obtained and put before the Tribunal, together with a copy of any initial communication from the Bar Pro Bono Unit - which as it is not advice, it is presumably not subject to privilege - and also from ACAS which, in each case, bears on time limits in employment cases.

21. We have considered anxiously whether the matter could be dealt with by the same Employment Judge. We have considered that in light of the issues of credibility, which arose and will rise again, and given the unquestioned findings of Employment Judge Matthews in relation to that credibility, it is appropriate that the matter should be heard by a different Tribunal.