Appeal No. UKEATS/0017/18/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 18th January 2019
At 10.30am

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

Mr John Galloway — APPELLANT

Wood Group UK Limited — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Michael Briggs Thompsons Solicitors 285 Bath Street Glasgow G2 4HQ
For the Respondent	Ms Margaret Gibson Burness Paull LLP Union Plaza 1 Union Wynd Aberdeen AB10 1DQ

SUMMARY

The EAT was asked to decide what the words "an email address" in paragraph 9(2) of schedule 1 of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014/254 meant. The EAT decided that Parliament meant an actual email address. The Appellant had in error supplied an email address that did not exist. Parties were agreed that if ACAS's abortive attempt to issue an early conciliation certificate using this non-existent email address could not be said to involve the use of an "email address" within the meaning of the Regulations, then time had not begun to run in terms of s. 207B(2)(b) of the Employment Rights Act 1996 and the Appellant was not out of time for the purposes of claiming lodging his claim for unfair dismissal.

THE HONOURABLE LORD SUMMERS

1. This appeal turns on the meaning of the words "an email address" where they appear in paragraph 9(2) of schedule 1 of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014/254.

> 9. - (1) Where ACAS issues an early conciliation certificate, it must send a copy to the prospective claimant and, if ACAS has had contact with the prospective respondent during the period for early conciliation, to the prospective respondent.
>
> (2) If the prospective claimant or prospective respondent has provided *an email address* to ACAS, ACAS must send the early conciliation certificate by email and in any other case must send the early conciliation certificate by post.
>
> (3) An early conciliation certificate will be deemed received—
>
> (a) if sent by email, on the day it is sent; or
>
> (b) if sent by post, on the day on which it would be delivered in the ordinary course of the post.

2. Regulation 9(2) requires ACAS to send an early conciliation certificate to a prospective claimant by email if the prospective claimant "has provided an email address" in the online form. In this case the Appellant provided what bore to be an email address and ACAS sent the early conciliation certificate to the email address he provided. Unfortunately, the Appellant had omitted a character in his email address. He had left out what was variously described in submissions as a "dot" or "full stop". I was not

informed whether the stop was part of the generic configuration of UNISON email addresses or a personal choice by the user. Whatever the position it had the (no doubt unintended) consequence of creating a trap for the unwary. The email address given to ACAS was johnboland@unitetheunion.org instead of john.boland@unitethe union.org, the true email address. John Boland was the Appellant's Union representative.

3. In course of time ACAS decided to send an early notification form. The certificate was sent to the address the Appellant had supplied but since no such address existed, it was never received by the Appellant's representative. Indeed, it is a bit of a mystery what became of the email since according to ACAS it did not "bounce". In other words, it was not returned as an undeliverable item of mail. The possibility then arose that this was a genuine email address registered to another John Boland. I raised this issue with parties' representatives. It was not suggested to me that it was possible that there was an account of that name registered to some other UNITE member. So, notwithstanding the absence of an "undeliverable" message, it was accepted that it was not a "valid" email address and that whatever had become of the email it had not been received by his representative.

4. The error was picked up eventually but by then the claim was out of time. The error was compounded by a failure by the Appellant's legal representative to realise the true position with the result that further time was lost.

5. In the Employment Tribunal it was argued that time began to run on the date the Appellant's employment was terminated, 7 June 2017, and was suspended under the statutory regime on 30 August 2017 when an early conciliation notification form was submitted. It was argued that time began to run again not when the abortive email

message was sent but on 19 October when ACAS sent a copy of the certificate to his personal email address. In the findings in fact there is no explanation of why the copy was sent. There is no indication that ACAS had become aware that the earlier email to the UNISON representative had not arrived. What is clear is that shortly thereafter the Appellant and his representative became aware that the email that was meant to trigger the resumption of the three-month time limit (Day B) had not been received.

6. In this connection I should note that statute regulates the position when conciliation with ACAS has been initiated. In effect the three-month time limit for lodging the claim is suspended when conciliation is underway. The day when time begins to run again after the certificate is issued is dubbed "Day B" under s. 207B(2)(b) of the Employment Rights Act 1996.

7. At the Employment Tribunal the Appellant sought to argue that the email to the Appellant's personal address triggered Day B. That was rejected since it depended on the proposition that ACAS had failed to comply with their obligation to send a certificate by email. The employment judge held that they had fulfilled their duty by sending an email albeit to an invalid address. The Appellant has not sought to argue that there was any failure by ACAS in this appeal.

8. At the Employment Tribunal the Appellant also sought to rely on section 111(2) of the Employment Rights Act 1996 so as to extend the time limit. Employment Tribunal decided that it was reasonably practicable for the Appellant to present his claim within the time limit. No appeal is taken against that decision.

9. In considering this appeal I am asked to concentrate on the meaning of the phrase "an email address". I am not asked to consider issues of culpability or blame. I hope I do justice to the Appellant's oral and written submissions by saying that they come down to the basic proposition that "an email address" means an actual email address. It was argued that an "email address" which is not viable because it is not registered to a user is not "an email address" for the purpose of the Regulations. Although Mr Briggs sought to fortify his position by reference to the latitude permitted in the case of postal service (paragraphs 24-30 of his Written Submission) this was not the primary point he made. I should note in this connection that Mr Briggs did not seek to rely on a number of further arguments laid out in paragraphs 31 et seq. of his Written Submission. Mr Briggs also referred to **Mist v Derby Community Health Services NHS Trust** [2016] ICR 543 at paragraphs 53 and 55. This case however was not concerned with the issue of construction argued before me and was not of assistance.

10. The Respondent argued that the validity of a purported email address was unimportant. What mattered was whether it appeared to be an email address. Ms Gibson submitted that if the information contained a "local part" that is a name preceding the "at" sign (@) and then a "domain name", here "unitetheunion.com", that was sufficient. She did not argue that any sequence of letters, numerals or characters could constitute an email address for the purpose of the Regulations. She submitted that if the information supplied had the appearance of an email address then it should be treated as an email address for the purpose of regulation 9. It was also submitted that I should be reluctant to construe the words "an email address" as referring to an actual address as opposed to a non-existent email address because of the consequences that would flow from such an interpretation. First it was observed if an email sent to a non-existent address was effective under Regulation 9(2) the deemed date for service of the Certificate would not

be triggered and Day B under section 207B(2)(b) could not be fixed. This would have the effect of suspending the timetable indefinitely as there could be no deemed day for service under Regulation 9. She submitted that there was a risk that applicants might supply false email addresses so as to delay the commencement of Day B for the purposes of section 207B of the Employment Rights Act 1996. It was submitted that if a construction could be adopted which avoided these possible consequences, then it should be preferred.

11. I was referred to **Beasley v National Grid** [2008] EWCA Civ 742 paragraph 21 and 22 for the proposition that enforcing time limits may result in harsh consequences. It did not however assist with the issue in hand. Reference was also made to **Carroll v Mayor's Office for Policing and Crime** [2015] ICR 835. It concerned rule 3(3) of the Employment Appeal Tribunal Rules 1993 and whether it could be said that written reasons had been "sent" to a party where they had been sent to the wrong address. I was not able to derive much assistance from this case. It deals with the issue of whether the word "sent" carries in its meaning the idea of being sent to the correct destination. The EAT decided it did not consistent with prior authority. The case also emphasises the need for certainty in the interpretation and application of rules of procedure and the corresponding desirability of an equitable discretion where applying the rules results in injustice.

12. I have come to the view that the expression "an email address" means an actual email address and not, as here, an address that has never been set up or registered to any user or users. Since the object of the Form is to enable communication, the intention must have been to solicit an email address that could be used to send the certificate. If so the phrase must mean an actual email address. That is what the request on the form sought.

I find it difficult to accept that Parliament intended the words "an email address" to include invalid addresses that could not be recognised as an email address by a server and forwarded. It seems to me in that situation the sequence of characters supplied is no different in principle from a quotation from Shakespeare or a meaningless sequence of characters. If a computer sever cannot recognise the data as an address then I do not consider that it can be "an email address" no matter how closely (or not) it resembles one. A quite different situation would present itself if a wrong email address was supplied. It could be argued that the hapless claimant would have to rely on the statutory dispensing powers (111(2) of the Employment Rights Act 1996) if that were to occur.

13. The parties were agreed that if no email address had been supplied and if the ACAS attempt to send the certificate had not been effective, then Step B had not been taken. In that situation I presume that to progress matters either a correction to the form can be intimated to ACAS who can then serve on the accurate email address or the parties can agree between themselves that service has been accomplished timeously.

14. I can see that the effect of this decision is to rescue the appellant from his own error and his lawyers from their role in the subsequent debacle. Ordinarily errors are the responsibility of the person who fails to complete the procedural step in question. In that connection the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 rule 12(2A) allows minor errors on claims to be corrected. As noted above s. 111(2)(b) of the Employment Rights Act 1996 is designed to deal with situations where there has been a failure to present a claim on time. I am unable however to regard the question of fault as relevant to the task of construing the phrase "an email address". It seems to me that ascertaining the meaning of that phrase is a separate task from a consideration of who was responsible for the inaccuracy. It was not submitted that there

is any rule of law that forbids the Appellant from relying on the consequences of his own error. I do not consider it relevant to enquire whether the Appellant should have checked up on the position on 30 September when the month-long period of conciliation expired. It is also irrelevant in this context to attach any significance to the fact that a error had led to the loss of a significant right.

15. For completeness I should add that in assessing the meaning of the words "an email address" I have considered whether the view I have reached will have consequences that could not have been intended. I do not think however that the various consequences mentioned by Ms Gibson affect the issue of interpretation. I was not impressed by the suggestion that applicants might wish to suspend the process by deliberately supplying invalid email addresses. Normally applicants will wish to progress their application not delay them.

16. For all these reasons I allow the appeal.