Appeal No. UKEAT/0171/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 3 December 2019

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR O ADEDEJI APPELLANT

UNIVERSITY HOSPITAL BIRMINGHAM NHS FOUNDATION RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS LESLIE MILLIN (of Counsel)
For the Respondent	MS GEMMA ROBERTS (of Counsel) Instructed by: Mills and Reeve LLP 78-84 Colmore Row Birmingham B3 2AB

SUMMARY

PRACTICE AND PROCEDURE – Striking - out/dismissal

PRACTICE AND PROCEDURE -Preliminary issues

The employment judge had not erred or misdirected herself when refusing to extend time to bring a race discrimination claim brought three days out of time.

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THE HONOURABLE MR JUSTICE KERR

Introduction

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1. This is another appeal arising in the context of the early conciliation provisions, though compliance with the early conciliation certificate regime is not directly the issue. The issue is whether the employment judge was entitled to refuse to extend time for bringing claims. The appeal is against the decision of Employment Judge Woffenden, initially given orally without reasons on 24 July 2018, with reasons given later, dated 17 October 2018 and sent to the parties on 23 October 2018.

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Background Facts

2. The appellant, "the claimant" as I shall call him, began working for the respondent as a consultant surgeon in 2004. In 2014, an investigation into his work performance started. There were capability hearings in December 2016 and January 2017. In February 2017, he was dismissed on capability grounds with pay in lieu of notice, but offered demotion as an alternative so that, while staying on the same salary, he would no longer be able to undertake complex surgery.

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3. He accepted that offer and returned to work on 6 March 2017, but went off sick 10 days later. He obtained an early conciliation certificate on 23 May 2017 (ECC (1)). Two days later, on 25 May 2017, he resigned on three months' notice. He returned to work on 5 June 2017 to work out his notice period and his employment ended on 25 August 2017.

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4. The primary three month limitation period so far as dismissal was concerned was, therefore, due to expire at midnight on 24 November 2017, unaffected by ECC (1) which

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preceded his effective date of termination and, therefore, preceded the running of the limitation period linked to termination of his employment.

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5. From May to November 2017, the claimant was in contact with the British Medical Association (BMA) and the General Medical Council (GMC) about his future medical practice. He hoped to avoid the need for proceedings. He also sought legal advice from 6 November 2017, from solicitors.

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6. He then believed, wrongly, that ECC (1) was invalid. On 23 November 2017, he contacted ACAS, again, seeking a further ECC. However, the solicitors warned him on 24 November 2017 that ECC (1) was not invalid and that its effect was, or could be, that he needed urgently to present his claim not later than that very day, 24 November 2017.

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7. The claimant started work on his ET1 that day but he did not manage to present it and worked on it over the weekend, so that it was not presented until the Monday, 27 November 2017. He cited ECC (1) in the claim, not having yet received a further ECC. He knew that he could not bring his claim without giving the number of an ECC obtained from ACAS.

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8. He then received a second ECC (ECC (2)) on 1 December 2017, after his claim had been presented. The judge below subsequently found that ECC (1) was valid but that, as it predated the dismissal, it had no effect on the running of time with regard to any cause of action founded on the dismissal. The claimant does not have permission to pursue any appeal against that part of the decision.

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9. Subject to any extension of time and any argument founded on acts extending over a period, the claim insofar as founded on dismissal, whether unfair or discriminatory, is three days out of time. Neither of the two ECCs had any impact on the running of time. ECC (1) came too

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early for that. ECC (2) came too late; see **Romero v Nottingham City Council** (2018), UKEAT/0303/17/DM.

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The Claim

10. The claim was, as I read the ET1 and as the judge construed it, for constructive unfair dismissal and discrimination on the ground of race. The judge below was prepared to entertain at least the possibility that the homemade ET1 and grounds included a claim that the act of dismissal was an act of race discrimination, i.e. that the dismissal was not just unfair but discriminatory as well. Although he had received legal advice, the claimant did not have solicitors on the record.

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11. In his grounds of claim, he also said he was making "another type of claim", by ticking a box to that effect. That was described as "mobbing (or model harassment or sham peer review) – a combination of workplace bullying and psychological terror perpetrated by a group in a systematic way over a prolonged period to force someone out of the workplace."

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12. The claimant sought reinstatement, eventually (subject to the GMC's position) without restrictions on his medical practice.

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13. The details of his claim were wide-ranging and diffuse and included matters that the Employment Tribunal had no power to determine, such as the respondent's responsibility for stress-related illness.

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14. The Particulars were set out in 40 numbered paragraphs and ran to six pages. There were several mentions of "harassment" but not directly linked to the claimant's race nor to the **Equality Act 2010**. The details of the claim recited the claimant's version of the factual history, going

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back to the start of his difficulties in 2014. He relied on what he said were acts of race discrimination in November and December 2016 in the following terms:

> **"…Dr Rosser…offered that, in return for me agreeing to go back to Nigeria that he would be able to facilitate a rehabilitation programme…that would see me revalidated as a consultant colorectal surgeon…on 8 December 2016, Mr Radley approached me and said he would be able to facilitate my reskilling if I agreed to Dr Rosser's proposal…this is contrary to the Equality Act 2010, Sections 13.1 and 19.1.".**

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15. Later, towards the end of his detailed claim, said that the "harassment did not stop".

> **"I got back to work on 5 June 2017 to serve out my notice period and Mr Suggett, the Clinical Services Lead, came to me and informed me that my sick leave continued [sic] I would be referred to the GMC for fitness to practice. Obviously, I don't think he knew that I had already resigned."**

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16. The claimant, therefore, was or appeared to be relying on acts of race discrimination in November and December 2016 and, at least arguably, in June 2017.

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17. On 12 March 2018, the respondent filed its ET3. It denied everything and asserted, among other things, that the claims were all out of time, that ECC (1) was effective but had no impact on the running of time and that ECC (2) was purely voluntary and had no legal effect.

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<u>The Decision of the Employment Judge</u>

18. In the judgment given without reasons, announced orally on 24 July 2018 and sent to the parties the next day, the judge decided first that ECC (1) was valid. Secondly, she decided that the unfair dismissal complaint was out of time and that it had been reasonably practicable for it to have been presented in time. That complaint was, therefore, dismissed.

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19. Third, the judge decided that the race discrimination complaint had not been presented in time and that it was not just and equitable to extend time. That claim too was, therefore, dismissed. In her full reasons, the judge explained that decision in a manner that I paraphrase very briefly as follows.

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20. She set out her findings of fact which were, in more detail, as I have paraphrased them earlier in this judgment. She mentioned the points made in the grounds of the claim and, in particular, the alleged acts of discrimination from November 2016 to June 2017. She referred to a document produced by the claimant at the preliminary hearing and to his oral evidence at that hearing.

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21. She noted that he referred to a "continuum of breaches in trust and confidence" and that he had said he wanted to amend his claim, though without having made any formal application to do so. She then set out the relevant law, both statutory provisions and case law, in a manner that is not controversial. It included reference to case law relevant to this appeal, namely **Robertson v Bexley Community Centre** [2003] IRLR 434 and **British Coal Corporation v Keeble** [1997] IRLR 336, among other cases.

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22. She then referred to the submissions of Ms Roberts for the respondent, who also appears before me today, and of the claimant, who was then contending that ECC (1) was valid and in the alternative argued that time should be extended if the tribunal were to find that the claim had been presented out of time.

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23. In her reasoning and conclusions, she stated first that ECC (1) was valid and that the primary three month limitation period, therefore, expired at midnight on 24 November 2017. She pointed out that the claimant is a well educated man, he was aware of time limits, is intelligent and had access to lawyers. She commented that he had left matters very late and taken a risk.

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24. Having concluded that the unfair dismissal claim could have been presented in time, she turned to the race discrimination aspect of the claim. She stated at paragraph 31 that "…if the complaint is the allegedly constructive unfair dismissal, the time limit for presenting such a claim

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also expired on midnight 24 November 2017. If not, then the position is as submitted by Miss Roberts…", namely that the acts of discrimination relied on were very much older than that.

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25. At paragraph 32 the judge said:

> **"In the case of any complaint in respect of the allegedly constructive unfair dismissal the delay is not substantial. If, however, the complaints are the alleged acts on 30 November 2016 and 8 December 2016 and the alleged act of harassment on 5 June 2017, the complaints are substantially out of time...".**

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26. She then went on to comment that the reasons for the delay, insofar as evidenced by the claimant, were of his own making and that the delays had had (paragraph 33):

> **"an inevitable impact on the cogency of evidence given the historic nature of the claim of constructive unfair dismissal (if that is said to be an act of race discrimination) and the time which has elapsed in relation to the other allegations of race discrimination allegations."**

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27. The claimant asked the judge to reconsider her decision. She declined, saying the decision stood and there was no reasonable prospect that it would be altered on a reconsideration because

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the arguments of the claim were the same as before. That decision was sent to the parties on 15 January 2019.

The Appeal

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28. By then, the claimant had already appealed to this appeal tribunal. On the papers, His Honour Judge Auerbach allowed the appeal to proceed on one ground only:

> **"2 …. that the Employment Tribunal erred when deciding whether to extend time in relation to a possible claim in discriminatory constructive dismissal (as opposed to the disputed complaints of racially discriminatory treatment during employment) in not taking account of the fact that, while that possible claim drew upon 'historic' allegations, had it been presented three days earlier, it would, as such, have been in time and/or in not sufficiently explaining its reasons in that regard."**

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The Parties' Submissions

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29. Ms Leslie Millin made the following main points which I paraphrase from her skeleton argument and oral submissions before me today. She pointed out that the discretion to extend

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time on just and equitable grounds was very broad. She drew support from the decision of the then President, Morison J, in **Mills and CPS v Marshall** [1998] IRLR 494, at paragraph 22, in which the then President commented that, if a fair trial is possible despite the delay, "on what basis can it be said that it would be unjust or inequitable to extend time to permit such a trial?".

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30. She referred me to rule 62(5) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, in Schedule 1, which is the well known provision stating the requirements of a judgment, which include stating how the law has been applied in order to decide the issues. Rule 62 also provides, at sub-rule (4), that the reasons given for any decision "shall be proportionate to the significance of the issue" and for decisions other than judgments may be "short".

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31. Ms Millin submitted that the reasons provided for not allowing the claim to proceed when it was only three days out of time, so far as reliance on dismissal were concerned, were inadequate in that the judge had not addressed the point that the additional three days could not realistically have impacted on the cogency of the evidence.

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32. Ms Millin pointed out that there is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings, see **Abertawe Bro Morgannwa University Local Health Board v Morgan** [2018] IRLR 1050 CA in the judgment of Leggatt LJ. Ms Millin submitted that the exercise of the judge's discretion was thereby flawed.

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33. Ms Roberts, for her part, defended the judge's decision and reasoning. She pointed out that the judge had set out the law impeccably. In relation to the discriminatory constructive dismissal element of the claim being out of time by only three days, Ms Roberts submitted that the judge was plainly aware that that was a delay that was "not substantial", in the judge's words.

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34. The shortness of that delay was, therefore, in the judge's mind and it was a matter for her to weigh. The weight to be given to particular factors relevant to the exercise of discretion was, Ms Roberts submitted, a matter for the judge and it was not for the appeal tribunal to interfere absent perversity or some other error of law or approach.

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35. She referred me to the judgment of Laing J in **Miller v Ministry of Justice & Others (Part time Workers)** UKEAT/0003/15/LA. Ms Roberts contended that there was no obligation on the judge to explain the effect of the additional three day delay on the cogency of the evidence in respect of the historic race discrimination allegations dating back to 2016 and June 2017. The judge, said Ms Roberts, had correctly identified and weighed the relevant matters and there was no error of law or approach.

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Reasoning and Conclusions

36. The appeal is narrow in compass. In accordance with Judge Auerbach's order, it relates only to a possible claim of discriminatory constructive dismissal, as distinct from the long out of time complaints of racially discriminatory treatment during employment.

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37. The context here was that the judge was entitled to reject the suggestion that the claim should be amended so as to plead a "continuum" case, i.e. that there had been an act extending over a period, and was entitled to reject the notion of an improvised application to amend the claim which was apparently mentioned during cross-examination of the claimant at the hearing on 24 July 2018.

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38. A further matter of context is that the judge cannot be faulted and, indeed, is not criticised for refusing to extend time for the constructive unfair dismissal claim to be validated, applying the stricter "not reasonably practicable" test. In any case, there is no permission to appeal the

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judge's decision on that point. The sole issue in the appeal relates to the exercise of the judge's discretion whether to extend time to allow the claim for discriminatory constructive dismissal to proceed. He decided not to, recognising that the delay in that regard was "not substantial".

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39. The discretion whether to extend time for a discrimination claim, applying the "just and equitable" test is, as the parties agree, a broad one which has been considered in numerous cases. It is unnecessary to cite them here. The judge's explanation for not allowing the claim that was

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out of time by only three days to proceed, was scant. Nonetheless, her comment that the delay was "not substantial" must be read in the light of the accompanying comments on the cogency of the evidence going back to June 2017 and, indeed, earlier, to November 2016.

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40. The judge was fully entitled to consider the effect of delay on the cogency of evidence relating to those earlier events when considering the constructive unfair dismissal claim, and to give such weight to that issue as she thought right, within reason, for the purpose of considering

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the part of the claim that was only three days out of time. The earlier historic allegations of race discrimination would be admissible in evidence as background contextual evidence even if the sole cause of action related to the allegedly discriminatory constructive dismissal.

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41. The issue, therefore, comes down to whether the judge adequately addressed relevant matters and weighed them in a permissible manner. I remind myself that the relevant factors are the **Keeble** factors derived from section 33(3) of the **Limitation Act 1980**, which deals with

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discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for

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information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once

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he or she knew of the possibility of taking action. The judge cited **British Coal Corporation v Keeble**. None of the factors derived from it and from section 33 of the **1980 Act** was missing from her assessment.

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42. I accept the submission of Ms Roberts, drawing on the Judgment of Laing J in **Miller v Ministry of Justice**, that it was for the judge to decide what weight to give to the shortness of the three day delay, of which she was aware. As I have already noted, the shortness of that delay had to be considered in the context of the much longer delay following historic events which would be admissible in evidence.

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43. I can find no flaw or fault in the exercise of the judge's discretion in refusing to extend time. There was nothing unlawful of perverse about the manner in which she exercised it by refusing to extend time, applying the just and equitable test.

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44. This appeal tribunal, therefore, has no basis for interfering with the decision and the appeal must be dismissed.

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