Appeal No. UKEAT/0185/19/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 February 2020

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

RATHBONE & ROCHE LTD — APPELLANT

MS CLAUDIA MADUREIRA — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR RICHARD OWEN-THOMAS (Of Counsel) INSTRUCTED BY: Downs Solicitors 156 High Street Dorking Surrey RH4 1BQ
For the Respondent	MS CLAUDIA MADUREIRA (The Respondent in Person)

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SUMMARY

JURISDICTION / TIME POINTS

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An ET erred in holding that a form ET1 had been lodged in time. The "corresponding date rule" taken with Section 207B of the ERA 1996 provides for a straightforward "Day A and Day B" calculation to be carried out. Applying that formula to the EDT as permissibly determined by the ET in the present case, the ET1 was presented out of time, and the ET that it had been reasonably practicable for the Claimant to have presented it in time. The appeal was therefore allowed.

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HIS HONOUR JUDGE MARTYN BARKLEM

1. In this judgment I shall refer to the parties as they were before the tribunal. This is an appeal against the decision of an Employment Tribunal ("the ET") sitting at London South, Employment Judge M J Downs sitting alone, which held that the Claimant's effective date of termination of her employment with the Respondent was 30 November 2017, and that the Claimant's claim for unfair dismissal, presented on the 27 April 2017, had been brought in time.

2. The ET went on to hold that, were it wrong in its conclusion that the claim had been brought in time, it *had* been reasonably practicable for the Claimant to have brought her claim in time. In other words, it rejected her contention that it had not been reasonably practicable for her to have submitted it earlier than 27 April 2018.

3. The appeal arises in a rather curious way. In her ET1, the Claimant referred to her employment having ended on 29 November 2017. In the ET3 the Respondent ticked the box marked 'Yes', to the question whether it agreed the start and end dates of employment and, in the text of the response, said (see paragraph 4) that, 'The Claimant's limitation date to present her claim to the ET, based on her effective date of termination is 26 April 2018. The Claimant appears to have issued her ET1 on 27 April 2018'.

4. The Tribunal explained what then happened at paragraphs 9 and 13 of its reasons.

> **"9. The Respondents invited the Tribunal to determine the issue of Jurisdiction as concerns the claim for unfair dismissal. Having heard the Claimant introduce the matter they conceded that the Claimant was contending that the effective date of termination was not 29th November 2017 as set out in her ET1 at Box 5 but rather 30th November 2017 (this appears in the chronology included with her ET1). The Claim form states that the Claimant first became aware of her dismissal when she received a letter confirming the same by recorded delivery and then became aware that it had been sent to her by email later the same day i.e. Thursday**

30th November 2017. Helpfully the Respondents defined the preliminary issue for the Tribunal as follows.

(i) When was the effective date of termination? If it was 29th November 2017 then the claim was out of time. If it was 30th November 2017 then the Claimant was in time.

(ii) If the Claimant was dismissed on the 29th November it would have to be satisfied that it was not reasonably practicable for the complaint to be presented before 29th November 2017.

The Relevant Law

10. The Tribunal referred itself to Employment Rights Act 1996, section 111.

(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… 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a)"

11. Employment Rights Act 1996, section 207B covers the extension of time limits to facilitate conciliation before institution of proceedings and states:

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (" a relevant provision").

But it does not apply to a dispute that is (or 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 Tribunal Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are bought, 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 issues 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"

12. Additionally, the Tribunal referred the parties to the IDS Handbook on ET Practice and Procedure as concerns time limits and also the decision of the EAT of 12th April 2018, in Luton Borough Council v Haque (Jurisdictional Points - Claim in time and effect date of termination) [2018] UKEAT 0180_17_1204 which determined that "where it applies, sub-section 207B (4) operates to extend the time limit as first modified by sub-section 207B (3) of the ERA"

> **13. The Tribunal read the written submissions on behalf of the Respondent and the witness statement submitted on their behalf additionally the Tribunal read the witness statement of the Claimant and heard her sworn evidence. She was cross-examined in a sensitive and proportionate way on behalf of the Respondents. I mention this because it is apparent that the Claimant is a vulnerable person. Her evidence is that she has some depression and many financial and family pressures. Drafting and submitting a claim in her circumstances would have been a formidable endeavour."**

5. The ET correctly set out the law relating to the extension of time limits to facilitate conciliation before the institution of proceedings at paragraphs 10 - 23 of the Reasons.

6. Entirely understandably, based on the contents of the ET3 which I mentioned above, the ET seems to have made the assumption that if the true EDT was 30 November 2017, then the claim would have been brought in time. It did not go on to undertake the date calculation envisaged by Section 207(b).

7. The Respondent has appealed on the basis that, even with an EDT of 30 November, (which is a factual finding by the Tribunal, and is not subject of an appeal) the ET1 was still submitted a day late.

8. At the Rule 3(7) stage, the sift, the appeal was rejected, Elisabeth Laing J considering that the ET had reached the correct conclusion.

9. Following a hearing under Rule 3.10, the matter was permitted to go to a full hearing, by His Honour Judge Auerbach, who said that the following was arguably the correct analysis

> **"The EDT was 30 November 2017. There is no appeal against that finding. Applying the corresponding date rule to the three- month period (see University of Cambridge v Murray [1993] IRLR 460 and Pruden v Cunard Ellerman Limited [1993)IRLR 317) that would have expired on 28 February 2018.**
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> **Day A is 26 February 2018. Day B is 26 March 2018. Appling section 2017B (3) the extension period 27 February -26 March inclusive, that is, 28 days (Tanveer v East London Bus Coach Company, Luton Borough Council v Haque).**
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> **So, the three-month period as extended would have expired on the 28 March 2018.**

Turning to section 207B (4) one month after day B 26 April 2018 (Tanveer). As time would have expired during the period from day A to that date, it instead expires on that date.

Therefore, it is arguable that the claim, presented on the 27 April 2018, was one day late.

Even if the Respondent made a concession that, if the EDT was found to be 30 November 2017, the claim was in time (and counsel told me he did not agree that there had bene such concession), arguably it is not bound: Radaakovits v Abbey National [2010] IRLR 307 (CA)."]

10. The Claimant has not been represented on this appeal. She has said, quite understandably, that she has found it difficult to deal herself with the legal technicalities of the point of law before me and simply prays in aid the comments of Laing J at the Rule 3(7) stage. Most of her submissions concern the alternative finding made by the ET as respects to the question of reasonable practicability. Aside from the procedural difficulty that there is no cross-appeal, it seems to me that the ET made permissible findings of fact on the evidence which it heard.

11. The test of reasonable practicability is one which presents a high hurdle for a Claimant to surmount, and whilst I understand and sympathise with the points which the Claimant makes, it is not an issue on which I am permitted to substitute my own view for that of the Tribunal, as I explained to her today.

12. In his skeleton argument, Mr Owen Thomas who appeared before me and below, submits that this is a case in which the time limit is that determined by Section 207B(4) namely one month after Day B. He relies on **Tanveer v East London Bus and Coach Company** UKEAT/0022/16/RN for the proposition that, in determining 'one month after Day B, the corresponding date rule in **Dodds v Walker** [1981] 1WLR 1027 (HL) applies.

13. In **Tanveer**, Her Honour Judge Eady QC, as she then was, explained the legal position as follows

> **"23. Most of the statutory limitation periods with which an ET will be concerned specify that the complaint must be presented to the ET within the relevant period beginning with a particular date. Unfair dismissal claims, for example, must be presented "before the end of the period of three months beginning with the effective date of termination" (section 111(2) ERA 1996) and thus the first day of the three month period is the date of termination itself, the issue that concerned the Supreme Court in Barratt.**
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> **24. Should the approach be different because the statutory language uses the expression after? That was the issue that concerned the House of Lords in Dodds. Because of the difficulty of determining the expiration of a calendar month - where the number of days can vary - the Courts have long adopted the corresponding date principle. So, although Dodds concerned a period after the giving of notice, the date on which the notice was given was taken to be the relevant date when then projecting forward for the corresponding date the next month. The rule is simple and it is well established that - when the relevant period is a month or specified number of months after the giving of a notice or other specific event - the relevant time period ends upon the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given or the specified event occurred.**
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> **25. Recognising the weight of authority against his submission, the Claimant observes that the approach to section 207B(4) should fall into the minority of cases allowed for by the House of Lords in Dodds; section 207B(4) did not involve a plurality of months, which was the main reason for the corresponding date rule. The House of Lords in Dodds expressly talked, however, of a calendar month or months, deliberately covering both possibilities. The speech of Lord Diplock recognised the kind of exceptional case that might fall outside the rule in discussing the difficulties where notices are given on the 31st of a 31 day month and expire in a 30 day month or in February (see the extract from his speech above). It did not include the case involving a single month.**
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> **26. No other reason has been identified before me that would justify my adopting an approach contrary to that laid down in Dodds, which I am bound to follow. Whilst I suspect this may be the first appeal heard relating to the provisions of section 207B, to the extent it is seen as providing guidance, it does so by applying the well established corresponding date principle. That has the attraction of simplicity and clarity; it is binding upon me. I dismiss this appeal."**

14. The effect of the corresponding date rule is that a period a month 'from', or, 'after' a particular date ends on the corresponding date in the following month. As Day B in the present case was, it is common ground, 26 March 2018, one month after that date is 26 April 2018. As the claim was received by the Tribunal on 27 April 2018, it was one day out of time.

15. In my judgement, the Respondent is therefore correct in its present statement of the legal position. It is a matter of regret that the decisive case law mentioned above was not referred to in the Notice of Appeal. Had it been, the matter is likely to have been resolved rather more quickly, possibly by the sifting judge referring the matter back to the Tribunal for reconsideration.

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