EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 March 2021

Before

JOHN BOWERS QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

UKEAT/0217/19/AT

MRS S KENDALL	APPELLANT
KKDC ENGLAND LTD & MS J MOON (DEBARRED)	RESPONDENTS

UKEAT/0218/19/AT

MS KS KIM	APPELLANT
KKDC ENGLAND LTD & MS J MOON (DEBARRED)	RESPONDENTS

UKEAT/0219/19/AT

MRS S DAS	APPELLANT
KKDC ENGLAND LTD & MS J MOON (DEBARRED)	RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR M JACKSON (of Counsel) Instructed by: Newport Citizens Advice Bureau Ltd 8 Corn Street Newport NP20 1DJ
For KKDC England Ltd	MR R MCLEAN (of Counsel) Instructed by: Lawbriefs Ltd Studio 108 Grand Union Studios 332 Ladbroke Grove London W10 5AD
For Ms J Moon	Respondent debarred from taking part in these appeals

SUMMARY

CONTRACT OF EMPLOYMENT

UNLAWFUL DEDUCTION FROM WAGES

In a case where four claimants delegated the presentation of their claims to one of their number, the tribunal was entitled to consider whether it was reasonably practicable for her to bring the claim in the relevant three months period, and to decide that it was as she was aware of the relevant time limits. It was unnecessary for the tribunal to consider the "skilled adviser" line of cases, not least because this was not pursued in the tribunal. Presentation was reasonably practicable in the relevant sense of capable of being carried out. The appeals were dismissed.

JOHN BOWERS QC, DEPUTY JUDGE OF THE HIGH COURT

1. This hearing concerns an appeal against Employment Judge Balogun's determination that the claims against the first respondent were not presented in time and that it was reasonably practicable for them to have been so. She sat alone in London South Tribunal on 3 and 4 December 2018.

2. The appeal concerns claims for unauthorised deductions and wrongful dismissal brought by four claimants. In terms of deduction of wages, that is by section 23(2) and (4) Employment Rights Act 1992, the time limit is three months beginning with the date of payment of wages from which deduction was made or, if not reasonably practicable, within such further period as the Tribunal considers reasonable. In relation to wrongful dismissal, that is the same period by a similar provision in article 7 of the *Extension of Jurisdiction Order 1994*. The redundancy payment claim was accepted as being in time.

3. The matter was complicated because of the insolvency of a linked company and a subsequent transfer to the first respondent under regulation 4 of the *Transfer of Undertakings (Protection of Employment) Regulations*.

4. The claim was presented on 13 October 2017. There were different cases amongst the claimants, three of whom appeal. One was debarred from taking part in proceedings. In terms of Mrs Kendall, the unusual circumstances related to her giving birth on 25 August 2017. Another claimant Ms Kim gave birth on 9 August 2017. None of the appellants in the EAT nor Ms Moon completed written witness statements for the original Employment Tribunal hearing but I have Employment Judge Balogun's excellent notes from the hearing and an attendance note by counsel

for the first respondent. I did not consider that attendance note as it was unnecessary to do so. I should say that counsel for the appellants did not appear below.

5. I take into account the following propositions of law which are relevant:

(1) Any conflict between the written decision and a note of evidence should be interpreted in favour of the written decision (**Ogidu-Olu v Guys Hospital Board of Governors** [1973] ICR 645 (NIRC)).

(2) The EAT must not use a fine toothcomb when reviewing the factual findings of the ET (**ASLEF v Brady** [2006] IRLR 576 (EAT), particularly paragraph 55).

(3) It is not necessary for the Tribunal's decision to recount all the evidence.

(4) It is for the appellants to show precisely why it was that they did not present their claims within the time limits (amongst other cases, **Porter v Banbridge Ltd** [1978] ICR 943 (CA)).

(5) It is necessary for me to consider the extent to which the appellants advanced certain arguments in the Employment Tribunal hearing and I should say at this stage that there was

no reference there to what have become known as "the skilled adviser cases".

6. In terms of the consideration by the Employment Tribunal, I need to look very carefully at the structure of paragraphs 17 to 22 of the Reasons. I pick out these features. Firstly, at paragraph 17, it is said:

> **"The evidence of the claimants was that a single claim was lodged on behalf of all by [the first claimant]."**

That claim is against the original company which was insolvent.

7. Secondly, at paragraph 17, it is said:

> **" the claimants were aware at a very early stage of their potential claim and their right to pursue it through the tribunal."**

8. Thirdly, it is said:

> **"[The claimants] were aware of the existence of [the first respondent] through three of their former colleagues ... The claimants therefore had sufficient knowledge of [the first respondent's] potential liability to have lodged a claim against [the first respondent] at any point from June 2017 onwards."**

9. Fourthly, there is reference to a letter to which I have been taken from the Insolvency Service, which the claimants said was ambiguous as to when they had to claim within three months of, but the Tribunal judge said:

> **"I am satisfied that the letter is unambiguous in its terms and that the reference clearly relates to the Insolvency Service's decision only [namely against the original company]."**

10. Then, paragraph 19 goes on to say:

> **"... [the first claimant] told the tribunal that she had carried out research prior to lodging the original claim in June and was aware of the requirement that the three months ran from the EDT."**

The judge stated that, if the claimants were confused, they could have "queried it or indeed taken some independent legal advice" and they did not do so.

11. Then, at paragraph 21, the Judge says, "No adequate explanation has been given for the delay." That could be a compendious way of summing up what appeared between paragraphs 17 and 20.

12. Then, she goes on to say:

> **"Although C4 [that is Ms Kim] told the tribunal that she had been in hospital with her baby, she had been discharged before 4 September even though her baby was still in hospital. In any event, C4, C2 and C3 had authorised C1 to act on behalf of the group and they confirmed to the tribunal that everything she did was on behalf of them all."**

13. Then comes this sentence, which Mr Jackson has criticised and is really at the heart of his case and to which I will revert:

> **"Therefore, they are all bound by any acts or omissions done by C1 on their behalf, including late presentation of the claim."**

Mr Jackson contends that that involves the question of the taking on of skilled advisers and the question of whether ignorance of time limits was justifiable, and it is at the heart of his submission that the skilled advisers cases were ignored.

14. Carrying on with the structure of the Tribunal's decision, at paragraph 22, the EJ wraps it up by saying:

> **"Taking all of this into account, I find that it was reasonably practicable to lodge the claims in time and there is therefore no reason to extend time."**

She then dismisses the complaint.

15. That is the structure of the decision. I now briefly consider the law on reasonable practicability and skilled advisers. In particular, I drew assistance from the masterly, if I may say so, summary of the position set out in **Lowri Beck Services Ltd v Brophy** [2019] EWCA Civ 2490 at paragraph 12.

16. I also bear in mind what has been said several times now, in particular in **Marks and Spencer plc v Williams-Ryan** [2005] ICR 1293, that there should be a liberal interpretation of "reasonable practicability" in favour of the employee.

17. I was also taken to **Hammond v Haigh Castle & Co Ltd** [1973] 2 All ER 289 (NIRC): which decides that "practicability" means “capable of being carried out” or “feasible according to the general standards of ordinary people”.

18. I was also referred to **Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53, and particularly what Lord Justice Scarman said at paragraph 64, and **Wall's Meat Co Ltd v Khan** [1979] ICR 52 (CA).

19. Essentially the question of reasonable practicability is a matter of fact for the Tribunal and, of course, tribunals are used to dealing with this question regularly. There is, however, a developed jurisprudence on what one might call "the adviser cases" that was first articulated in **Wall's Meat Co Ltd v Khan** [1979] ICR 53. Lord Denning MR, although this was technically obiter, said:

> **"Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights -- or ignorance of the time limit -- is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."**

20. This point was reiterated in both **London International College Ltd v Sen** [1993] IRLR 333 (CA) and indeed the **Lowri Beck** case.

21. The claimants in this case had to deal with a complex set of circumstances, namely insolvency which raises complexity, the early conciliation process and the impact of births in two of the cases. I accept that this case was borderline, and the employment judge could easily have found the other way but she did find presentation was reasonably practicable. I do think, however, one needs to look at the submissions that were made below and which no doubt assisted the Tribunal judge. I also accept that, when the test is applied, it must be the correct one.

22. What the appellants' counsel says -- eloquently, if I may say so -- is that Employment Judge Balogun does not make the necessary findings properly to determine whether or not it was reasonably practicable for the claimants to have presented their claims in time. He says that there is a distinction to be drawn between professional and lay advisers. If a person has a reason for making a mistake, it depends whether that mistake was justifiable, and it is harder for a person

with a legal adviser to say that there was a justifiable mistake. He says that there were three elements that must be demonstrated, namely whether there was a skilled (as opposed to a lay) person, whether a person was acting as a representative and whether a person was "engaged" in the sense of acting as the claimants' agent and that proper findings were not made.

23. The respondents, however, argue that the question is all a matter of fact and proper reasons were given. They draw attention to the fact that, in paragraph 21, it is stated that the appellants C4, C2 and C3 had authorised Ms Moon to act on behalf of the group and that they were all bound by any acts or omissions done by Ms Moon on their behalf. Ms Moon said in evidence, "We did the research ourselves and saw it was three months." In response to the question, "Were the others relying on you?" she said, "No, everyone was doing their own research." Mrs Kendall said, "As a group, we were all individuals."

24. I do find paragraph 21 of the Reasons somewhat troubling when read alone, but it has to be looked at in the context of firstly the evidence given, secondly the submissions made and thirdly the structure of the judgment. I think that here the Tribunal were merely wrapping up the judgment after making the crucial finding that no adequate explanation had been given for the delay.

25. The Tribunal is effectively asking itself rhetorically, having made the compendious finding for all four claimants, "Is it possible to take into account that there were differences?" The reply is "no" because, although Ms Kim was in hospital and there were other individual variations between the cases, the action of presentation of the claims was delegated not in any role as an adviser (legal otherwise) but delegated practically to Ms Moon, so it was her reasons that were important for not presenting the claims in time and she was not ignorant of the time

limit. Thus, in my view, neither the skilled adviser points nor the unjustifiable ignorance issue arises in this case, not least because the point was not argued in the tribunal.

26. On the findings by the Tribunal, this "lead" litigant in person changed from one month to the next, as can be seen with Mrs Kendall submitting the original claims and Ms Moon submitting the later claims.

27. It does seem to me that grounds 1 and 2 are intimately linked and, although I fully accept that this case could have gone either way, I think that overall, notwithstanding the slightly ambiguous nature of paragraph 21, the Tribunal did ask itself the relevant questions and answered in what was a borderline case. Presentation was reasonably practicable in the relevant sense of capable of being carried out

28. A separate ground of appeal was put forward in relation to inadequate reasons. It seems to me that, as Mr Jackson accepted, brevity in Judgments is in fact to be generally encouraged. The correct questions were asked and answered. In this respect, I apply the test formulated by Bingham LJ (as he then was) in **Meek v City of Birmingham District Council** [1987] IRLR 250 (CA):

> **"The decision of an [Employment] 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 these 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."**

It seems to me that here the decision between paragraphs 12 and 22 was sufficient.

29. It follows that, notwithstanding the eloquence of Mr Jackson in presenting the case, I dismiss this appeal.