Appeal No. UKEAT/0196/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 August 2016
Judgment handed down on 13 September 2016

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

THE GOVERNING BODY OF SHEREDES SCHOOL — APPELLANT

MR B DAVIES — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING &
RULE 6(16) APPLICATION - RESPONDENT ONLY

APPEARANCES

For the Appellant	MR JASON BRAIER (of Counsel) Instructed by: Hertfordshire County Council (Legal Services) County Hall Pegs Lane Hertford Hertfordshire SG13 8DE
For the Respondent	MR JACK MITCHELL (of Counsel) Instructed by: Arkrights Solicitors 15-17 Exchange Road Watford Hertfordshire WD18 0JD

SUMMARY

JURISDICTIONAL POINTS - Extension of time: reasonably practicable

The Claimant instructed solicitors in relation to an unfair dismissal claim. Time for presenting the claim was to expire on 25/10/15. On 08/10/15 the solicitors advised him to seek new solicitors in relation to the claim but gave no advice about the need to present a claim by 25/10/15. On 14/10/15 there was a Solicitors' Regulatory Authority ("SRA") intervention which prevented the solicitors from taking any action or communicating with clients thereafter. The Claimant saw other solicitors on 05/11/15 and, with the assistance of his wife but without having obtained the file, presented his claim on 10/11/15.

The Employment Judge extended time for presenting the claim under section 111(2)(b) **Employment Rights Act 1996** on the basis that the SRA intervention was a special reason preventing the presentation of the claim in time. She failed to consider (as invited by the Respondent) whether the solicitors should have advised on 08/10/15 that the claim needed to be presented urgently and what the result would have been if such advice had been given.

That was an error of law and the appeal would be allowed. Further, since it was clear that the solicitors should have advised of the urgent need to present a claim and that, if they had done so, a claim would have been presented in time, the Employment Appeal Tribunal substituted a decision that the claim was out of time and the Employment Tribunal had no jurisdiction to consider it.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Sheredes School (the Respondent below) against a Decision of Employment Judge Manley sitting in Watford sent to the parties on 11 May 2016 by which she allowed the Claimant's complaint of unfair dismissal to proceed under section 111(2)(b) of the **Employment Rights Act 1996** notwithstanding that it was presented after the expiry of the three month time limit provided by section 111(2)(a) (as extended by section 111(2A)). It has been argued with skill and enthusiasm by counsel on both sides.

Facts

2. The Claimant, Mr Davies, was employed as a caretaker at the School from 1 January 2003 until his dismissal on 12 June 2015. When he was dismissed he and his wife and children were also given notice to vacate the home provided to them by the School. He suffered a serious mental health crisis after his dismissal and his wife largely took responsibility for their affairs.

3. Mr Davies and his wife instructed a firm of solicitors, Blavo and Co, about both the employment and the housing matters. They saw Ms Tandi of that firm about the employment matter on 21 July 2015 and discussed tribunal proceedings.

4. On 10 September 2015 Ms Tandi made a reference to ACAS under the early conciliation process on Mr Davies's behalf. In due course ACAS sent an early conciliation certificate to Blavo and Co issued on 25 September 2015. That meant that time for presentation of a complaint of unfair dismissal would ordinarily expire on 25 October 2015 but the Judge

found that Mr and Mrs Davies believed (reasonably) that the process had been started by the reference to ACAS and that there was no need to do anything more.

5. Mrs Davies chased for information during September and early October 2015 but it was not until 8 October 2015 that she spoke to Ms Tandi by phone. In that call Ms Tandi told her that "it would be better if [they] went elsewhere in relation to [the] employment matter" as well as the housing matter. Although the Judge did not expressly refer to a series of emails from Mrs Davies to Ms Tandi which are in my bundle at pages 84 to 86 it is plain from them that immediately following this conversation Mrs Davies sought to find new solicitors and to obtain the file from Blavo and Co.

6. On 14 October 2015, before the file could be obtained, there was a Solicitors' Regulatory Authority ("SRA") intervention at Blavo and Co. The effect of that was that the firm was closed down and could not communicate with clients and that the SRA took possession of all its papers. Mr and Mrs Davies were unaware of the intervention at the time.

7. In the meantime they found a new firm of solicitors and, although they had by then still not been able to retrieve the file, they saw a Mr Smith about the employment matter on Thursday 5 November 2015. It seems they were advised at that meeting for the first time of the need to present a claim form and (no doubt) to do so urgently. On Tuesday 10 November 2015, 16 days out of time, they presented an ET1 claiming unfair dismissal. They did so without the benefit of legal assistance and without the file, Mrs Davies doing most of the work.

A **Law**

8. Section 111(2)(b) provides that a Tribunal can consider a claim for unfair dismissal which is presented outside the three month limit provided by section 111(2)(a) if it is presented

> **"… 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."**

B

9. The law on this provision is well trodden by the Court of Appeal and the EAT, and the Judge was referred to the relevant authorities. For the purposes of this appeal it is sufficient to refer to only a few passages from those authorities. In **Wall's Meat Co Ltd v Khan** [1978] IRLR 499 CA Brandon LJ said this at paragraph 44:

C

> **"… The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance … or mistaken belief … is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant … or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."**

D

E

In **Riley v Tesco Stores Ltd** [1980] IRLR 103 CA Waller LJ said at paragraph 37:

> **"… If you have retained a skilled adviser and he does not take steps in time, you cannot hide behind his failure. There may be circumstances, of course, where there are special reasons why his failure can be explained as being reasonable. …"**

F

In **Trevelyans (Birmingham) Ltd v Norton** [1991] ICR 488 Wood J in the EAT said at page 491C:

G

> **"… if [a complainant's] advisers give him unsound advice or fail to give him proper advice, or fail to give him advice on a relevant issue, then the failure of those advisers is the failure of the applicant and does not provide a good excuse for the escape clause. …"**

H

Submissions and conclusions

10. The Judge's reasoning, which Mr Mitchell supports, was in essence that Mr Davies and his wife were, quite reasonably, ignorant of the need to present a claim form by 25 October 2015; they had entrusted matters to a firm of solicitors and the solicitors were prevented from doing anything further by the SRA intervention on 14 October 2015; that intervention was a "special reason" explaining the solicitors' failure as being reasonable (to adopt the words of Waller LJ in the **Tesco Stores** case) so that it was not reasonably practicable for the claim form to be presented in time.

11. Mr Braier for the School, on the other hand, says that on 8 October 2015 when advising Mrs Davies to seek other solicitors, Blavo and Co could and should also have advised her of the urgent need to present a claim form by 25 October 2015 and that, if they had done so, she and Mr Davies could have presented a claim form in time regardless of the intervention, in the same way as they did on 10 November 2015. He points out that the Judge was expressly invited to find that Ms Tandi could and should have so advised but failed to consider the issue.

12. I confess I wavered somewhat while hearing the parties' submissions and that I find it somewhat paradoxical that the Davies appear to be in a worse position than they would otherwise have been because they actively chased up Blavo and Co and managed to speak to Ms Tandi on 8 October 2015. However, there can really be no argument that they ought to have been advised on that occasion of the urgent need to present a claim; nor can there be any doubt that, if they had been so advised, the claim could have been presented in time. The failure to present the claim therefore arose from "the fault of [the] solicitors … in not giving such information as they should reasonably in all the circumstances have given …" (to quote Brandon LJ in the **Wall's Meat** case) and did not arise from the SRA intervention. Although

the intervention may have provided a "special reason" explaining the solicitors' failure to advise or present a claim after 14 October 2015 if there had been no conversation on 8 October 2015, the plain fact is that there was such a conversation and that it pre-dated the intervention.

13. It seems to me that it was a clear error of law for the Judge to fail to consider what advice the solicitors ought to have given on 8 October 2015 and what would have happened if they had given it and that the appeal ought therefore to be allowed. Further, I am clear that, had the Judge considered those matters, there was only one possible conclusion she could have reached, namely that it was reasonably practicable for Mr Davies to present his claim before 25 October 2015. Given that conclusion I see no need to refer the matter back to the Employment Tribunal. This is a case where I can properly substitute a decision to the effect that the claim for unfair dismissal is out of time and that the Tribunal has no jurisdiction to consider it.

14. There was a cross-appeal by Mr Davies against the refusal of the Judge to allow an amendment to the claim form to clarify (as he would have it) or add (as the School would have it) a claim of automatic unfair dismissal on the grounds of "whistleblowing" under section 103A of the **Employment Rights Act**. Mr Mitchell properly accepted that if I were to decide the appeal as I have done the cross-appeal would become academic and I therefore dismiss it.

15. I appreciate that this outcome is likely to be very disappointing, if not baffling, to the Davies. The only consolation I can offer is that they may well (though it must be emphasised that the solicitors have not had an opportunity to be heard by a court at this stage) have a claim against Blavo and Co in respect of the loss of an opportunity to bring a claim against the School which ought, as I understand it, to be covered by insurance.