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Case No: A2/2019/1034

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Employment Appeal Tribunal

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 12 December 2019

BEFORE:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
and
LORD JUSTICE DAVID RICHARDS

BETWEEN:

LOWRI BECK SERVICES LTD

Appellant

- and -

PATRICK BROPHY

Respondent

MR M BUDWORTH appeared on behalf of the Appellant
MR A KORN appeared on behalf of the Respondent

APPROVED JUDGMENT

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(Official Shorthand Writers to the Court)

1. LORD JUSTICE UNDERHILL: This is an appeal against the decision of the Employment Appeal Tribunal (HHJ Eady QC sitting alone) dismissing an appeal against a decision of the Employment Tribunal (Employment Judge Goraj sitting alone) on a preliminary issue as to limitation.

2. The Claimant was employed by the Appellant company, which provides meter reading services, as a meter operative. He is severely dyslexic, and in matters of an official nature he relies very heavily on the help of his brother, Mr Michael Brophy.

3. In May 2017 formal disciplinary proceedings were commenced against the Claimant arising out of an incident in which he was said to have left a meter in a dangerous condition. The disciplinary hearing took place before a Mr King on 21 June 2017.

4. EJ Goraj found that at the disciplinary hearing Mr King told the Claimant that he would not make an immediate decision but would let him know the outcome in writing. Mr King's evidence was that it was in fact his practice to let an employee know the outcome by telephone in advance of the formal letter, but the Judge found that he did not communicate that to the Claimant. He did however telephone him on 29 June and tell him, as the Judge found, that he was being dismissed for gross misconduct, with immediate effect; that he would be receiving a letter; and that he could appeal within five days of receiving the letter. She also found that the Claimant was very distressed to be told that he was being dismissed for gross misconduct.

5. The Claimant did not receive the promised letter until a week later, being 6 July, though the date on the letter itself is 4 July. The letter was headed "Re: outcome of disciplinary hearing -- gross misconduct". It began:

> "Further to the disciplinary hearing held on Wednesday, 21 June 2017 and out telephone conversation on Thursday, 29 June 2017, I am writing to inform you of my decision".

It will be noted that although that mentions the telephone conversation of 29 June, it is phrased as informing the Claimant of the decision rather than confirming what he had

already been told. The letter goes on at some length to explain the reasons for the decision. Near the bottom of the second page it says:

> "I have no option but to dismiss you for gross misconduct. This dismissal will be with immediate effect from 29 June 2017."

It will be noted that the decision is again expressed in the present tense. It is also, however, important to note that the dismissal is said to be effective from 29 June: that date was no doubt referred to by Mr King because of the telephone conversation on that day, but it does not expressly make the connection.

6. The Claimant told his brother (to whom I will sometimes refer for convenience as Michael Brophy) about the letter. He also explained at that point (though he had not mentioned it earlier) that there had been a conversation on 29 June, but he did not when telling his brother about that conversation say that he had been told by Mr King that he was being dismissed with immediate effect. Michael Brophy then drafted a somewhat confused letter to the Appellant, adumbrating an intended claim, which was sent in the Claimant's name.

7. A few weeks later Michael Brophy contacted a barrister friend for some informal advice. In his email seeking the advice he referred to the date of dismissal having been in "early July", and the barrister told him that that meant that there was "an early October date" for submitting an ET1. It is clear from a subsequent letter which he wrote on the Claimant's behalf that Michael Brophy was at that point proceeding on the basis that the unfair dismissal proceedings did need to be commenced in early October.

8. The Claimant in fact presented his claim on 5 December 2017. Although other complaints were made, the only claims with which we are now concerned are for unfair dismissal and disability discrimination and a claim for wrongful dismissal under the tribunal's breach of contract jurisdiction.

9. I should at this point set out the relevant provisions as to limitation. These fall into two categories, which I take in turn.

10. The first comprises the unfair dismissal and wrongful dismissal claims. Section 101(1) of the Employment Rights Act 1996 gives employees the right to pursue a claim of unfair dismissal in the Employment Tribunal. Subsection (2) reads:

> "(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 -
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> (a) before the end of the period of three months beginning with the effective date of termination, or
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> (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."

Article 7 of the Employment Tribunals Extension of Jurisdiction *(*England and Wales*)* Order 1994 is in substantially similar terms.

11. The primary time limit is thus three months from the effective date of termination, but a longer period can apply: I use the shorthand that the period can be "extended", though that is not the actual statutory language. The conditions for an extension are twofold:

(a) that it was not reasonably practicable for the complaint to be presented in time; and

(b) that it was presented within such further period as the tribunal considers reasonable.

12. There has been a good deal of case law about the correct approach to the test of reasonable practicability. The essential points for our purposes can be summarised as follows:

(1) The test should be given "a liberal interpretation in favour of the employee (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] ICR 1293, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53).

(2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119. (I am bound to say that the reference to "feasibility" does not seem to me to be a particularly apt way of making the point that the test is not concerned only with physical impracticability, but I mention it because the Employment Judge uses it in a passage of her Reasons to which I will be coming.)

(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.

(4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*). I make that point not because there is any suggestion in this case that the Claimant's brother was a skilled adviser but, again, because the point is referred to by the Employment Judge.

(5) The test of reasonable practicability is one of fact and not of law (*Palmer*).

13. The other relevant limitation provision is that applying to claims under Part 5 of the Equality Act 2010, including a claim of disability discrimination such as we are concerned with in this case. By section 123(1) of the Act, such claims

> "may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable".

14. There is also case law about the correct approach to the exercise of the discretion under section 123(1)(b) and its predecessor provisions. We were referred to the decision of this court in *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327, in which Sedley LJ said at paragraph 31:

> "…there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in *Robertson* that it either had or should."

We were also referred to the decision of this court in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] ICR 1194, where Leggatt LJ said at page 1201:

> "18. First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33…
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> 19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
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> 20. The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion

> on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 576; [2003] IRLR 434, para 24."

15. In addition to those provisions, a claimant may be entitled to a further period of extension by virtue of the early conciliation provisions introduced by the Enterprise and Regulatory Reform Act 2013. The provisions in question are rather complex, but all that I need say for present purposes is that a claimant cannot issue employment tribunal proceedings without a certificate issued by ACAS – the so-called "EC certificate" – stating that they have complied with the requirement to contact ACAS in order to give it the opportunity to facilitate conciliation. The certificate will state the date on which that contact occurred. If the primary time limit would have expired during that period, time will be extended by one month from the date of the certificate. In the present case ACAS issued an EC certificate on 13 November giving the date that it was contacted by the Claimant as 30 September.

16. All the complaints with which we are concerned were brought outside the applicable primary time limit. There was initially a dispute as to whether the Claimant's dismissal occurred on 29 June, when he was telephoned by Mr King, or only when he received the letter of 4 July, i.e. on 6 July. The Employment Judge decided that the dismissal took place on 29 June, and that is now common ground before us. On that basis the primary time limit expired on 29 September. It follows that no ACAS extension could operate, because the primary time limit expired the day before the contact date as specified in the EC certificate, and the extension only operates on a period which is still live.

17. A preliminary hearing was directed in order to decide the limitation issue in respect of all or any of the claims. The hearing took place before Employment Judge Goraj in the Exeter Employment Tribunal on 25 and 26 June 2018. The Claimant was represented by Mr Anthony Korn of counsel and the Appellant by Mr Michael Budworth of

counsel. The Judge gave her decision at the conclusion of the hearing, finding, as I have said, that the claims were out of time by reference to the primary time limit but granting extensions. Written reasons were sent to the parties on 10 August.

18. The Judge gave her reasons on the section 111/article 7 aspect of the issue at paragraph 49 of her Reasons in eleven numbered sub-paragraphs, which read as follows:

> "(1). The Claimant is a vulnerable individual who has dyslexia and related issues as identified in the report of Ms Pryce including in respect of his ability to process information whilst under stress.
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> (2). The Claimant was told at the conclusion of the disciplinary hearing on 21 June 2017 (page 271 of the bundle) that the Respondent would inform him of the disciplinary decision in writing.
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> (3). The Claimant relied, upon his brother, Mr Brophy to support and assist him with any difficult matters/ decisions.
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> (4). The conversation on 29 June 2017 between Mr King and the Claimant was very brief and Mr King referred during the conversation to a letter which would be sent to the Claimant confirming the position.
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> (5). Mr Brophy was not privy to such conversation and only became aware of the Claimant's dismissal after the receipt of the Respondent's letter dated 4 July 2017 on 6 July 2017.
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> (6). The letter from the Respondent dated 4 July 2017 (which was prepared with the assistance of the Respondent's HR department and was approved by Mr King) is unclear and contradictory. In the opening paragraph Mr King states that he is writing to inform the Claimant of his decision. Moreover, later in the letter Mr King states, 'This dismissal will be with immediate effect from 29 June 2017'.
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> (7). It is clear from the subsequent correspondence that Mr Brophy was under the impression that the Claimant's dismissal took effect at the beginning of July 2017 pursuant to the Respondent's letter dated 4 July 2017 which was received on 6 July 2017. This is clear from (a) the letter which Mr Brophy wrote to the Respondent on 10 July 2017 (page 276 — 277 of the bundle) (b) from the email Mr Brophy received from Mr Hadgill dated 5 September 2017 (page 281 of the bundle) and (c) from his Mr Brophy's subsequent letter to the Chairman of the Respondent dated 29 September 2017(page 317 of the bundle). Further, Mr Brophy prepared the Claimant's claim form on such basis.

(8). Mr Brophy is not a skilled adviser.

(9). The Tribunal is satisfied that here was a misunderstanding by the Claimant/his brother, Mr Brophy, regarding the effective date of the termination of his employment and the consequential relevant deadline for the purposes of presentation of the claims.

(10) Further the Tribunal is satisfied that such misunderstanding arose in the circumstances referred to above including that (a) the Claimant was told at the disciplinary hearing that the decision would be notified in writing (b) the very brief telephone conversation on 29 June 2017 during which the Claimant was told that he would receive a letter and (c) the terms of the Respondent's letter dated 4 July 2017 as referred to above.

(11) The Tribunal is further satisfied that (a) the claim form was presented within a reasonable period thereafter having regard to the Claimant's/Mr Brophy's understanding regarding the date of the termination of the Claimant's employment and (b) that time should therefore be extended to entertain his claims of unfair dismissal and wrongful dismissal."

19. Setting out a long list of factors in that way is not perhaps the ideal way of explaining the reasons for a decision to extend time. Nevertheless, it is clear that the gist of the Judge's reasoning was that it was reasonable for the Claimant to delegate matters to his brother, having regard to his dyslexia; that he had failed effectively to communicate to his brother the fact that he had been told in the conversation on 29 June that he was being dismissed with immediate effect; that that failure was reasonable because of his difficulties in processing information when under stress, and also because he was told, both at the original disciplinary hearing and in the conversation on 29 June, that he would be receiving a formal letter; and that in the absence of that information it was reasonable for his brother to treat the dismissal as being effected by the letter notwithstanding the reference in it to dismissal being effective as from 29 June.

20. As regards the question whether it was just and equitable to extend time as regards the disability discrimination claim, the Judge said:

"51. When considering these matters the Tribunal has had regard in particular to the above findings and conclusions relating to the Claimant’s unfair dismissal and breach of contract claims.

> 52. The Tribunal has however reminded itself that it has to consider in respect of such claims whether it is just and equitable to extend the relevant time limits. When considering the issue the Tribunal has had regard in particular to the guidance contained in the EAT judgment of *British Coal Corporation v Keeble* 1997 IRLR 336 including the need to balance the prejudice between the parties of allowing any claim to proceed. The Tribunal has taken into account that the Respondent has not identified in evidence or submissions any prejudice (other than the requirement to defend the claims) to the Respondent if the Claimant was allowed to proceed with his claims of disability discrimination.
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> 53. Having regard to all of the matters previously referred to above, the Tribunal is satisfied that it is just and equitable to allow the Claimant's disability claims to proceed subject to the following proviso."

I need not set out the proviso to which the Judge refers at the end of para 53.

21. Without intending any disrespect to Judge Eady, I will not at this point summarise her reasoning, since the focus in a case like this must be on the reasoning of the Employment Tribunal. Mr Budworth, who made his submissions clearly and succinctly, advanced three grounds of appeal, which I take in turn.

22. The first challenges the Judge's finding on the reasonable practicability question. As developed in his oral submissions, Mr Budworth's essential point was that it was not reasonable for the Claimant – or, more realistically, his brother – to read the letter of 4 July as the letter which effected the dismissal and therefore to proceed on the basis that his effective date of termination was 6 July. The terms of the letter were on any reasonable view at least ambiguous. He emphasised in particular the clear statement in the letter that dismissal took effect from 29 June and the reference to a conversation on that date. He submitted that that should at the very least have put Michael Brophy on enquiry that the dismissal might have occurred earlier, and he could and should accordingly have sought advice in order to resolve that question. There was every opportunity to do so, since he in due course, as we have seen, took advice on the substance of the claim from a barrister friend. Mr Budworth reminded us that a mistake about when the time limit applies is unreasonable if the claimant or his adviser has not made such enquiries as they should reasonably have made. He characterised

the Judge's error of law as a self-misdirection because she failed to ask herself that particular question; but he said that it could also be said to be a failure to take into account a relevant consideration or, if necessary, straightforwardly perverse. He also suggested that the error about the date of dismissal should be treated as an error of law and thus be approached on the same basis as such an error was approached by this court in *Biggs v Somerset County Council* [1996] IRLR 203.

23. I am afraid I cannot accept that the Judge made any error of law here. The Claimant's mistake was not a mistake of law of the kind with which this court was concerned in *Biggs*, and the question whether it was a reasonable mistake was one for the factual assessment of the Employment Tribunal applying the liberal approach endorsed in the authorities. I agree with Judge Eady in the EAT that the Judge's assessment was one which was entirely open to her in the particular circumstances of this case. It was reasonable for the Claimant and his brother to take the view that his formal dismissal only took effect when he received a letter communicating it. That would be a natural understanding for lay people, reinforced by the fact that the Claimant had previously been told that he would be receiving such a letter. Of course the reference in the letter to dismissal taking effect from 29 June did muddy the waters, but it did not do so to a point where the Judge was bound to find that it was unreasonable of the Claimant and his brother not to have sought further advice.

24. I turn to the second ground, which is (to paraphrase) that if, which was the basis of the Judge's finding on the first ground, the Claimant was mistaken as to the date of termination, it could not be reasonable for her to extend time by more than the period necessary to accord with his mistaken view – that is, to three months after 6 July. That criticism did not feature in the Appellant's grounds of appeal to the EAT, and it was not raised by Mr Budworth in his oral submissions there. It was in fact raised by Judge Eady herself, who summarised the point in her judgment, where she said:

> "62. On that basis and for all those reasons, I cannot see a proper basis to interfere with this Decision, save that I feel I have to return to the question of whether the ET properly considered the issue as to whether the claim was lodged within a reasonable period once it was reasonably practicable for it to have been presented. On the ET's findings it would seem that it would have been reasonably practicable for the claim to have been presented on or before 5

> November 2017. There is no consideration in the ET's reasoning as to whether it remained reasonable for the Claimant not to lodge claim until 5 December.
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> 63. It may be that the answer to that question is that Mr Michael Brophy assumed that the extended ACAS early conciliation period to 13 November 2017 meant that the additional month provided by the stop the clock provisions allowed until 13 December for the lodgement of the claim. At this stage I cannot tell what view might have been formed about that, given that I cannot see that there was any consideration of the question. However, that seems to be explained by the fact that it just was not raised before the ET.
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> 64. As it has not been a point that has been raised on the appeal before me, it seems to me that the most I can say at this stage is that if this remains a jurisdictional question that has not been considered then it would be open to the ET at any subsequent hearing to consider this issue. I understand that the matter is due shortly to be heard at a Full Merits Hearing and it might be part of the submissions raised at that stage. It does not seem to me that I can really take that matter any further at this point. Therefore, for those reasons, I dismiss this appeal."

25. Although this criticism of the Judge's reasoning is now raised in the grounds of appeal to this court, I do not believe that we can or should entertain it any more than the EAT could. It is a new point and one which in principle could not be dealt with without the appropriate findings of fact.

26. Although that is the strict formal position, I believe that I ought to add, notwithstanding the absence of any such findings by the Judge, that the overwhelming likelihood must be that the reason why Michael Brophy did not present the claim on or before 6 October was that he thought that he had submitted the form to ACAS timeously and was entitled to the early conciliation extension. Of course, if the effective date of termination had been 6 July, that belief would have been correct. It follows that the reasonableness of the delay between 6 October and 5 December would for all practical purposes depend on the reasonableness of his initial mistake about the date of dismissal. (I would add, though this is, I accept, purely speculative, that that is why it did not occur to Mr Budworth to argue it as a separate point in the Employment Tribunal.) That being so, our decision on the first ground is for all practical purposes determinative of this ground too, even if it was available to be taken. I thus

respectfully disagree with Judge Eady about it being available to be revived at the merits hearing.

27. I should also record that I am in some doubt whether raising the point for the first time at the merits hearing would be open to the Appellant even if it were otherwise potentially good. Judge Eady evidently thought that it would have to be considered if raised because it was "a jurisdictional question". I am far from sure that that is the correct approach in a case of this kind, but I need not pursue the point further in view of the fact that I think the point is bad anyway for the reason given.

28. Finally, ground 3 challenged the Judge's decision on the “just and equitable” extension under section 123(1). Mr Budworth's submission was that at paragraph 52 of her reasons she had wrongly treated the absence of prejudice as the only and determinative question, whereas it was in fact only one element in the necessary overall assessment of justice and equity.

29. However, Mr Budworth accepted when it was put to him that it is clear from both the preceding and the following paragraph of her Reasons that the Judge had in fact taken into account also her previous findings on the section 111/article 7 extension, which were in short that the Claimant had missed the primary time limit because of a reasonable mistake and had brought the claim within a reasonable time thereafter. He acknowledged that if we were to uphold that finding, as I have made it clear I would, then paragraph 52 was unobjectionable: the Judge only dealt expressly with prejudice because that was the only remaining factor. He was plainly right to make that concession, the effect of which is that the outcome of ground 3 depends on the outcome of ground 1.

30. I would for those reasons dismiss this appeal. I would only add that this case is a good example of why it is unsatisfactory that the second appeals test, which applies to almost all other categories of appeal to this court and under which a second appeal will only be given permission if it raises an important point of principle or practice or there is some other compelling reason, does not apply to appeals from the Employment Appeal Tribunal.

31. LORD JUSTICE DAVID RICHARDS: I agree, and I would particularly endorse my Lord's comments on the lack of a second appeals test in relation to appeals from the Employment Appeal Tribunal.

Order: Appeal dismissed

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