Appeal No. UKEAT/0078/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 December 2017

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR S ENVER APPELLANT

SIMON JONES SUPERFREIGHT LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL FROM REGISTRAR'S ORDER

APPEARANCES

For the Appellant	MR TOM CROXFORD (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR DANIEL BARNETT (of Counsel) Instructed by: Messrs Buss Murton Solicitors Wellington Gate 7-9 Church Road Tunbridge Wells Kent TN1 1HT

THE HONOURABLE MR JUSTICE KERR

1. This is an appeal against a decision of the Registrar, made on 14 September 2017, refusing an application by the Respondent to a pre-existing appeal for an extension of time in which to file its Answer and cross-appeal. The Appellant, Mr Enver, was the Claimant below and I will refer to him as "the Claimant". The Respondent below - also the Respondent in the original appeal of the Claimant - wishes to become Cross-Appellant in a cross-appeal; but the effect of the Registrars' decision, unless overturned, is that that cannot happen and it is that decision against which the Respondent now appeals.

2. The background is this. On 8 December 2016 the Employment Tribunal, sitting at London South in a case heard before Employment Judge Freer back in August 2016, gave a Reserved Judgment with Reasons. The decision was that the Claimant had not been an employee of the Respondent for the necessary full two year qualifying period, but that his claim for money due under his contract succeeded. His contract had been terminated and he was awarded the sum of £2,343. On 19 January 2017, within the six week time limit, the Claimant appealed against part of the decision in which he had been unsuccessful.

3. That appeal came before His Honour Judge Richardson on the papers. Judge Richardson directed a Preliminary Hearing at which, in the usual way, only the Appellant would be heard, but granted the Respondent the opportunity to make concise written submissions. At paragraph 3, perhaps unusually, he ordered that if the Respondent intended to serve a cross-appeal that had to be done within 14 days of the seal date of his Order and directions should be applied as to the hearing or disposal of such cross-appeal. The seal date of that Order was 19 April 2017, although it had been made a week or so before that.

4. At the time when the Claimant's solicitors received Judge Richardson's Order, the grounds of appeal were in poor shape as the Judge himself commented. The Claimant's solicitors took up the invitation to make concise written submissions in a letter of 4 May 2017. That was not an easy exercise given the lack of focus at the time in the then grounds of appeal.

5. The matter then came before His Honour Judge Shanks at a Preliminary Hearing on 9 August 2017. Mr Croxford appeared then as he does today for the Claimant. Sensibly, it was directed by Judge Shanks that the grounds of appeal could be amended in line with what he described as the document produced to the Appeal Tribunal "*which wholly replaces the existing grounds*". I take it that that document was the succinct six paragraph single page document prepared by Mr Croxford, which is before me and which gave admirable clarity to the proposed appeal of the Claimant.

6. On that basis, Judge Shanks directed that the Claimant's appeal proceed to a Full Hearing. He gave the Respondent liberty to reply on paper within 14 days of the seal date of the Order to vary or discharge the Order for consequential directions. He also directed by paragraph 3 of his Order that within 14 days of its seal date the Respondent must lodge and file an Answer, and that if such Answer were to include a cross-appeal that the Respondent should apply on paper for directions as to the hearing or disposal of such cross-appeal.

7. The deadline previously imposed by Judge Richardson seems to be have been ignored by all concerned and that is not surprising since it predated any recognition that the Claimant's appeal would proceed at all. Effectively, therefore, Judge Shanks was giving the Respondent the usual 14 day period in which to cross-appeal if it wished and that period running in the usual way from the date of the Order directing a Full Hearing.

8. At that stage the amended grounds of appeal, which were clear, and the Order of Judge Shanks, which was also clear, were sent to the Claimant's solicitors. The seal date of the Order is 16 August 2017, and I infer that the solicitors received it very soon after that as is indeed confirmed in a statement of Mr Alex Lee of the Claimant's solicitors. The 14-day period therefore expired on 30 August 2017.

9. Mr Lee decided to instruct counsel and it was calculated that Mr Barnett - who appears today for the Respondent - though on holiday, would be able after his return from holiday to do the necessary work to meet the deadline. That deadline was, as I have said, 30 August 2017. On that day Mr Barnett and Mr Lee worked on the necessary documents constituting the cross-appeal. Unfortunately, however, it was not until 9.24am on 31 August 2017, the day after the deadline had expired, that the cross-appeal and Answer was lodged with the EAT by the Respondent's solicitors.

10. However, the solicitors had two days earlier, on 29 August 2017, which was the day before expiry of the deadline, applied by emailed letter of that date for a seven day extension of time for filing and service of any Answer and cross-appeal. Had that been granted, the cross-appeal would not have been out of time. The reasons given for seeking that extension were as follows:

> **"… at the time of service of the Notice, counsel of choice for the Respondent was away on holiday and it was unknown whether he would be able to act on behalf of the Respondent in the compiling of the Answer and Cross Appeal until relatively recently. That, together with the intervening bank holiday, has meant that although counsel has been instructed, counsel will not properly be able to advise the Respondent relating to the instructions given to him on behalf of the Respondent as well as preparing the documentation necessary for the Employment Appeal Tribunal to properly consider the Respondent's case in relation to the appeal in the time designated by the Appeal Tribunal.**
>
> **Having regard to the overriding principle, we do not believe that the proposed extension of time is likely to be prejudicial to [the Claimant] in the preparation of his own case. This is particularly the case given the conduct of the case thus far by [the Claimant]."**

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11. It was that application which came before the Registrar. It would have been obvious that it was unlikely to be determined before expiry of the deadline on 30 August, being made only the previous day. As matters stood, therefore, retrospective validation of the cross-appeal depended on a positive decision by the Registrar to grant rather than refuse the extension of time. On 14 September 2017, she refused it.

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12. The Registrar recorded in her Order that she also considered a letter from the Claimant dated 11 September 2017, but I have not seen a copy of that letter. The Registrar ordered as follows:

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> **"IT IS ORDERED that pursuant to the principles set out in *Slingsby v Griffith Smith Solicitors* [[2009] UKEAT/0619/07], the application to extend the time in which to file the Answer is granted, but given the different considerations which apply to Cross Appeals, the application to extend time and file the Cross Appeal is refused."**

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13. Mr Barnett for the Respondent submitted firstly that the **Slingsby** case is distinguishable. That case stands as authority that for the purposes of compliance with time limits, a cross-appeal stands on the same footing as an appeal. Thus, in **Slingsby** His Honour Judge Burke QC at paragraph 30 noted that:

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> **"30. … The juridical nature of a cross-appeal to the EAT is, as I see it, the same as that of an appeal. It attacks and seeks to have erased, reversed, or modified, a part of the Employment Tribunal's judgment, which is not criticised by the Appellant, and which, in the absence of an appeal or, if there is an appeal, in the absence of a cross-appeal would constitute on the relevant issue a final judgment between the parties. The policy reasons set out in the paragraph of Mummery J's judgment in [*United Arab Emirates v Abdelghafar* [1995] ICR 65], which I have earlier set out, for applying strict principles to an extension of time for the institution of an appeal in my judgment apply equally to the case of cross-appeal."**

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14. Mr Barnett submitted that that reasoning was distinguishable in the present case because an undetermined pre-expiry application to extend time had been made and was extant when time expired. He submitted that made the present case different from a case such as **Slingsby**, where no such application had been made. No analogy could be asserted in the present case with the situation in which relief from sanctions is sought under the **Civil Procedure Rules**.

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15. Accordingly, Mr Barnett submitted, the strict approach in **Abdelghafar**, and the line of authority at which it forms part, ought not to be applied here. Furthermore, Mr Barnett said that those authorities rely in part on the generosity of the six week limitation period for bringing an appeal to this Appeal Tribunal and that a subsequent conventional period of 14 days allowed for a cross-appeal and Answer is much less generous. He took me to case law in the **CPR** jurisdiction in which the now well-known distinction is recognised:

> **"… between on the one hand seeking for relief from a sanction imposed for failure to comply with a rule, practice direction or court order, where such failure has already occurred, and on the other hand seeking an extension of time for doing something required by a rule, practice direction or court order before the time for doing it has arrived." (*Robert* (see below), paragraph 33)**

16. He reminded me that Dyson LJ (as he then was) in **Robert v Momentum Services Ltd** [2003] 1 WLR 1577 had made this very point and had firmly stated that "*The latter cannot sensibly be regarded as, or even closely analogous to, a relief from sanctions case*". That reasoning was accepted and adopted in the judgment of Jackson LJ in **Hallam Estates Ltd v Baker** [2014] EWCA Civ 661 at paragraphs 26 to 30; see also the judgment of Nugee J in **Kaneria v Kaneria** [2014] EWHC 1165 (Ch) at paragraphs 31 to 34, approved by Jackson LJ in the **Hallam Estates** case at paragraph 26 of his judgment.

17. Mr Barnett submitted that this important distinction would have been relevant to the reasoning in **Slingsby** had there been in that case a pre-expiry application to extend time as there was in the present case. Similarly, he contended that the strict approach derived from the **Abdelghafar** line of cases is inapt or at any rate requires modification in cases such as the present, because Mr Barnett submitted in none of the four cases contained within the EAT familiar authorities bundle (**Abdelghafar**, **Aziz v Bethnal Green City Challenge Co Ltd** [2000] IRLR 111, **Jurkowska v HLMAD Ltd** [2008] ICR 841 and **Muschett v London**

Borough of Hounslow [2009] ICR 424) was any such application a feature of the facts. Consequently, he submitted that the Registrar had misdirected herself by applying the strict approach derived from **Slingsby**. In the alternative, he submitted that it was wrongly decided and should not be followed.

18. He suggested that delivering a cross-appeal was not the same as instituting an appeal. The provisions in the relevant **EAT Rules** are differently worded - see Rule 3 relating to the institution of appeals and Rule 6 relating to the delivery of cross-appeals - and he pointed out that there is no fixed time limit in the Rules for a cross-appeal. In accordance with the relevant **Practice Direction** and standard practice, time runs as it did in this case from the sift Judge's Order directing a Full Hearing and 14 days is the standard period but is not one found in the Rules. He also submitted that it was unrealistic to suppose that a potential Cross-Appellant, in particular a small employer, would be likely to invest time and money in considering a cross-appeal unless and until an appeal were brought by the other party.

19. He also submitted that in any event the **Jurkowska** case, decided in the Court of Appeal, was not authority for the strict approach to cross-appeals adopted in **Slingsby** by Judge Burke. He took me to paragraph 19 in the judgment of Rimer LJ in **Jurkowska**, which included the following quote:

> **"19. … I consider that Underhill J was correct to conclude, as he did in *Waller v Bromsgrove District Council* 23 May 2007, that rule 2A [which introduced the overriding objective from 2006 into the EAT procedural Rules] has not somehow trumped the *Abdelghafar* guidelines so as to require the Employment Appeal Tribunal to put them on one side and instead approach extension applications by reference to some wholly undefined and unprincipled appeal to justice. The contrary argument ignores the basic point that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made. The *Abdelghafar* principles reflect that rules as to time limits are expected to be respected, and there is precisely nothing unjust or unfair about that. Litigants are not entitled to expect rules of practice to be rewritten so as to accommodate their own negligence, idleness or incompetence. But the principles also recognise that nobody is perfect, that errors will happen, that time limits will be missed and that in appropriate circumstances it may therefore be just to extend time for compliance. That, however, is in the**

> **nature of an indulgence and the guidelines are directed at outlining the approach to the question of whether it will or may be fair so to indulge the appellant. …"**

20. His Lordship continued in similar vein and concluded near the end of the paragraph that he regarded the **Abdelghafar** principles as requiring all circumstances to be taken into account and that there is:

> **"19. … no scope for commissioning the rule 2A overriding objective into playing some additional role when it comes to the consideration of an extension of time for appealing. *Abdelghafar*'s case tells the court all it needs to know in order to deal with an extension application justly."**

21. Mr Barnett pointed out that Hooper LJ, who had expressed some doubt on the issue at paragraphs 56 and 57 of the Judgment in **Jurkowska**, had expressed some doubt about whether the overriding objective made any practical difference in view of Rule 20 of the **EAT Rules of Procedure** - which deals with interim applications which is the type of application that was made in this case - stating at Rule 20(1) that when every such application is made, the Registrar "*shall have regard to rule 2A (the overriding objective) …*".

22. Mr Barnett submitted that Judge Burke in **Slingsby** had misunderstood what was being said in **Jurkowska** and that in any event Rule 20, to which Hooper LJ had referred, was a legislative provision and left no room for overlooking the overriding objective when considering an application of the kind under appeal to me today.

23. He added finally that in his submission it was therefore for me to exercise the Appeal Tribunal's discretion afresh and he gave reasons at the end of his skeleton argument why I should do so in his favour. These amounted to the point that the extension at time requested was short. There would in any event be appellate proceedings because of the pre-existing appeal. The 14 day period for a cross-appeal is short. The pre-expiry application had been

made and there was a good reason for it, namely his own absence on holiday during August 2017. There would be no prejudice to the Respondent and, accordingly, it would be more consistent with the overriding objective to grant than to refuse the extension. He added that the merits of the potential cross-appeal were arguable and I assume that in his favour, though I have not heard argument on the merits or arguability of the potential cross-appeal.

24. Mr Croxford for the Claimant did not accept that **Slingsby** had been wrongly decided. He accepted that an interim application such as this, the overriding objective is relevant and that attention must be paid to it but contended that the objective is normally best served by having strict time limits as recognised in the case law. He noted that the stricter approach than previously adopted in the parallel **CPR** jurisdiction, arising from cases such as **Mitchell v News Group Newspapers Ltd** [2013] EWCA Civ 1537 and **Denton v TH White Ltd** [2014] EWCA Civ 906, came several years after **Slingsby** was decided in 2008 and that the overriding objective points to a stricter and not a more lax approach to time limits.

25. Mr Croxford accepted that in the **CPR** jurisdiction a distinction is recognised and maintained by cases in which a pre-expiry application to extend time is made and those when one has not been made, but he submitted that the distinction does not undermine the prior principle that extensions of time - as is well understood in this appellate jurisdiction - are rarely and sparingly granted.

26. He added that the more important the issue the more stringency is justified and that in a case such as the present, where a pre-expiry application to extend time is made only hours or a day or two before expiry of the deadline, such that there is no realistic prospect of it being determined prior to expiry of the deadline, there is no obvious reason why the person making

the application should be in a dramatically improved position than he would have been in if the pre-expiry application had not been made.

27. Mr Croxford accepted that the position could be very different if a potential Cross-Appellant had made a pre-emptive pre-expiry application at a much earlier stage in the process, for example, before the 14 day period had even begun to run, that period not appearing in the **Rules** themselves, but he emphasised that a party wishing to request the Appeal Tribunal's latitude in the matter of timing of a cross-appeal needed to make the application very early and to be in a position to comply with a deadline if and when the application is refused. In this case, submitted Mr Croxford, the Respondent had plenty of time to think about a cross-appeal, firstly when alerted by Judge Richardson's Order in April 2017 and subsequently on receipt of clarified and amended grounds of appeal in August 2017.

28. In my judgment, the jurisprudence relied on by Mr Barnett does not justify any fundamental or significant shift in the attitude and approach of this Appeal Tribunal to applications for extensions of time in the case of cross-appeals. I do not think it is of significance that the **Rules** differentiate between appeals and cross-appeals in the sense that they lay down a deadline for the former but not the latter and that the latter deadline is set conventionally pursuant to the **Practice Direction** by an Order of the Tribunal. What matters is that Judge Burke was correct to say that the juridical nature of an appeal and a cross-appeal is the same, for both seek to undo the decision below.

29. I also consider that a stricter approach is appropriate in a case where what is at stake is what could be called the acquisition of a limitation defence by the opposite party to the party wishing to appeal or cross-appeal, than in cases where no such issue is at stake. It is obvious

that if what is at stake is merely a relatively trivial step in the proceedings (such as a filing of the skeleton argument or a bundle) the Tribunal is likely to be more favourably disposed to extensions of time than in the case of make or break deadlines (such as the institution of a cross-appeal or an appeal).

30. The purpose of those deadlines is to confer something approaching certainty, as far as possible, so that the other party knows that it is at least very unlikely after expiry of the relevant deadline that he or it will be proceeded against in appellate proceedings. The same rationale underpins limitations periods in other fields of law, such as personal injury where limitation defences are intended to provide certainty, albeit tempered with discretions to extend time in appropriate cases on recognised grounds

31. I do not regard the present application as one, therefore, that ought to have been treated as a straightforward and simple extension of time application before the expiry of the deadline; and I accept Mr Croxford's submission that the more weighty the issue at stake, the more strict a party can expect the approach to extending time to be. For those reasons, while it may have been appropriate for the Registrar to have recognised that the Respondent had indeed made an application to extend time before the deadline expired, I do not think it is conceivable that the making of that application at the eleventh hour could possibly have made any difference to the outcome.

32. For those reasons I dismiss the appeal. The Registrar's decision was correct. I am of the view that her decision, and the decision I have just made upholding it, is completely in line with existing jurisprudence and case law, both in this jurisdiction and in relation to the parallel **CPR** jurisdiction.