Neutral Citation Number: [2023] EAT 144

Case No: EA-2022-000936-AT
EA-2022-000943-AT

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 November 2023

Before:

HIS HONOUR JUDGE SHANKS

- -

Between:

Ms Elaina Cohen **Claimant/ Appellant**

- and –

Mr Khalid Mahmood MP **Respondent/ Appellant**

- -
- -

MS MARTINA MURPHY (instructed by **McHale & Co. Solicitors**) for the **Claimant/Appellant**

MR TOM PERRY (instructed by **Clyde & Co. LLP**) for the **Respondent/Appellant**

Hearing date: 8 November 2023

- -

JUDGMENT

SUMMARY

The Claimant was dismissed by the Respondent and sought to bring a number of claims against him including unfair dismissal. She submitted an ET1 on which she inserted the wrong ACAS ECC number. She rectified the number immediately on the point being drawn to her attention but after the primary limitation period had expired. The claim was accepted but deemed to have been presented on the date of the defect was rectified. The ET extended time on the basis that it had not been reasonably practicable to present the complaint before the expiry of the primary limitation period.

The Respondent appealed on the basis that the ET had failed to consider whether the original error in inserting the wrong number on the form was reasonable.

The relevant authority is **Adams v BT [2017] ICR 382** a decision of Simler P on similar facts. The real issue in such a case is not whether the original mistake was reasonable but whether the mistaken belief that a form had been correctly presented and it was therefore unnecessary to do anything more was reasonable having regard to all facts and circumstances. The nature of the original mistake is relevant to this assessment but not determinative.
In this case the ET had in mind and took into account the nature of the original mistake when they addressed the real issue and decided to extend time. That decision was certainly not a perverse one.

HIS HONOUR JUDGE SHANKS:

1. Both sides appeal against aspects of the judgment of the Central London Employment Tribunal (EJ Adkin, Ms Church and Ms O'Shaughnessy) sent out on 2 August 2022 following a six day hearing in May 2022. The respondent below, Khalid Mahmood, is the Labour MP for Perry Barr in Birmingham. The claimant, Ms Cohen, worked in his office at Westminster from 24 November 2003 until he dismissed her on 27 January 2021. The parties had a romantic relationship in the early days of her employment but after that ended she continued to work for him. The Employment Tribunal said that the relationship between them had been dysfunctional for many years before the dismissal.

2. On her dismissal, the claimant brought proceedings in the Employment Tribunal alleging unfair dismissal both under sections 98 and under section 103A of the Employment Rights Act. She also brought claims for detriment based on whistleblowing and for discrimination and harassment based on her religion and race.

3. The Employment Tribunal found that her claims for unfair dismissal under sections 94 and 98 were well-founded on the basis of unfair process and they also found that part of the whistleblowing detriment claim was well-founded. They rejected her other claims and noted that the question of remedies for unfair dismissal would need to be considered in the light of the *Polkey* and contribution, which issues were left over to a remedies hearing.

4. In the claim form which the claimant had submitted on 22 March 2021, she had provided the wrong early conciliation number so that although it was issued on 22 March 2021 it was not, as it turned out, validly constituted until 16 July 2021. One of

the issues that the Employment Tribunal had to contend with was whether to extend time for lodging the claim form in relation certainly to the unfair dismissal and whistleblowing claims which they found well-founded on the merits. They did extend time on the basis that it had not been reasonably practicable for Ms Cohen to present her claim within the normal time. The date of the normal time is not recorded in the judgment but I am told today by Ms Murphy that it would have been 7 June 2021 and that has not been disputed by Mr Perry. Mr Mahmood appeals against the decision extending time for the bringing of those claims.

5. The Employment Tribunal first dealt with issues to do with the bringing of the claim at paragraphs 195 to 197 in their factual summary as follows:

> **195. On 22 March 2021 the claimant submitted a claim with an ACAS EC number which was entirely wrong, not merely a couple of transposed digits for example.**
>
> **196. The claimant's evidence is that she was filling in the claim form using her phone and that she somehow filled in the wrong ACAS number by mistake.**
>
> **197. At that time there were delays in processing new claims caused by an administrative backlog in the Tribunal due to the Covid-19 pandemic and associated lockdowns. On 21 June 2021 [so two weeks after 7 June] the Tribunal emailed the claimant requesting confirmation of her early conciliation number.**

The Tribunal went on to find that Ms Cohen did not receive that communication on 21 June 2021 and, indeed, did not receive a number of other emails sent by the ET on the topic until 14 July 2021. She then very promptly supplied the correct ACAS number and the mistake was rectified and the ET1 was treated as having been received on 16 July 2021, a date I have already mentioned. The Employment Tribunal, having made those findings of fact about the matter, turned to consider whether to extend time at paragraphs 222 to 233 of the judgment. I will come back to what they said in a moment.

6. The Employment Tribunal had been referred to two cases involving similar facts to these, ie where a claim form was put in with the wrong ACAS number. The first was a decision of Langstaff P on 18 February 2015 called *Sterling v United Learning Trust*, not formally reported but supplied to me in my authorities bundle; the second, was a decision of Simler P called *Adams v British Telecommunications Plc* [2017] ICR 382. Although there are those two authorities, I am quite satisfied that the only one that is really relevant for today's purposes is the decision of Simler P. The Langstaff P decision comes earlier in time, the crucial part of it for today's purposes (paragraph 24 of the judgment) was not necessary as part of the decision and it has effectively been impliedly overturned by the subsequent decision.

7. The important part of Simler P's decision is at paragraphs 19 and 20 which are at page 51 of my authorities bundle. Paragraph 19 starts in this way:

> **The question for the Tribunal was not whether the mistake that was originally made was a reasonable one but whether the mistaken belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances.**

Then the President goes on:

> **In that regard, it seems to me, it must be assumed that the claimant's error was genuine and unintentional. Further, as I have already indicated, it must be assumed that she was altogether unaware of the error since had she been aware of it no doubt she would not have made it or it would have been corrected.**

(Those latter two sentences obviously relate to the facts of the *Adams* case). At paragraph 20 the President makes some points about the significance of getting the ACAS number wrong and she says:

> **Those are factors that reflect on the degree to which the claimant was at fault in making the error and then in failing to appreciate that the error had been made. The Employment Judge was entitled to have regard to those factors and if she had been considering [what is called] the second claim and the facts and circumstances surrounding the second claim there would have been some reference at least to those features.**

So that gives an outline of the true question and the factors that may be relevant to the answer.

8. In the *Adams* case, Simler P was asked to decide the issue herself and she did that in paragraphs 30 and 31 and decided to extend time. In the course of paragraph 30 she said this:

> **Whilst it might not have been reasonable to make the mistake in completing the form that she [that is the claimant in that case] did, in the absence of any evidence to the contrary, I accept that it was a genuine and unintentional mistake and that the claimant was altogether unaware of that mistake until notified of it [by the Employment Tribunal in due course].**

Then at paragraph 31 she said:

> **Accordingly, I am persuaded on balance, that it was not reasonably practicable for her to present that second claim in time. She presented the second claim two days late, but she acted promptly and on the same day as she was notified of the defect. In my judgment, she acted within a reasonable period, and, accordingly, time should be and is extended in respect of the unfair dismissal claim.**

I take from this that the nature of the original error in putting the wrong number in the claim form may be relevant to the reasonableness of the claimant's belief that she does not need to put in a new or correct the form which has already been put in but it is certainly not determinative of anything on its own and, as I understand it, Mr Perry ultimately agrees with that position.

9. Mr Perry's point therefore really comes to the suggestion that in this case the Employment Tribunal failed to have regard to the nature of the error when they were making the real assessment required as to whether it was reasonably practicable to put in a claim form that was fully compliant. He referred in this context to submissions he had made in writing at the end of the Employment Tribunal hearing which are at page 23 in the supplementary bundle. He said:

> **The claimant's error in failing to enter the correct ECC number on the ET1 was not reasonable for the following reasons: (a) the claimant is familiar with the**

> **Tribunal process; (b) the number entered was not a minor typographical error with one or even a few digits. The number entered on the ET1 bears very little resemblance to the number on the ECC; and (c) the claimant has offered no sensible explanation for her error and she had lawyers.**

10. I have already quoted the findings of fact at paragraph 194 and following of the Employment Tribunal's judgment. As I said, they deal with whether to extend time at paragraphs 222 to 233. They very briefly summarise the facts relevant at paragraph 222 and they say, in terms:

> **The claimant sought to issue her ET1 on 22 March 2021 but included a completely different ECC number from that on her certificate.**

They then go on in [225] to say this:

> **We find that at the time that the claimant attempted to issue her claim form by telephone on 22 March 2021 she had no reason to believe that it contained the defective ACAS number. This was not a deliberate action and she was not aware it was defective. We find that in common with the *Adams* case this was a genuine and unintentional mistake.**

Then they refer to the delay and they say at [227]:

> **We find that the claimant was unaware of the mistake as to the ACAS number until 14 July 2021. We find that the claimant was labouring under the misapprehension that her claim had been validly submitted.**

Then at [228]:

> **"We find that this is a case with some similarity to *Adams* and that it was not reasonably practicable for the claimant to present a claim in time given the misapprehension she was under.**

11. It seems to me that Ms Murphy's submission that the Tribunal were asking themselves the right question is correct and it seems to me that they did have full regard to the relevant facts. As I have said, they referred to the fact that the number given was completely different to the correct one. They alluded, although rather

peripherally, to the evidence that the claimant had given about how this happened when they talk about her doing something by telephone (it was, in fact, as we have established today, not issuing the claim but filling in the claim form using her phone which is exactly what the Tribunal had said at paragraph 196). There is no reason to think that the Tribunal did not have in mind that she was familiar with the Tribunal process having made an earlier claim, or that she had not really offered a sensible explanation for the error.

12. It is clear that an error like this can easily be made. In a way, it is never reasonable to make such an error, but that is plainly not determinative as shown by the *Adams* decision. So it seems to me that the Tribunal did ask itself the right question and did address all the relevant facts. Their decision certainly cannot be categorised as perverse. Indeed, I observe that that was a somewhat brave submission in view of the fact that the facts here were very similar to those in *Adams* where Simler P herself decided to extend time. For those reasons, I dismiss Mr Mahmood's appeal.

13. Ms Cohen for her part appeals in relation to a particular head of detriment for whistleblowing. She says that the Employment Tribunal made a perverse finding when they said at paragraph 311 under the heading "The claimant sustained aggressive and bullying treatment at the hands of the respondent, including threats of dismissal" they say this:

> **The claimant does not in her witness statement set out the wording of any threat of dismissal or say in clear terms that on a particular date the respondent threatened to dismiss her. We do not find therefore [on the] balance of probabilities that he threatened her with dismissal.**

Then at [313]:

> **We do not find that there was detrimental treatment under this heading.**

14. However, much earlier in the judgment they had said this at paragraphs 41 to 43 when dealing with a particular head of protected disclosure:

> **41. On 26 January 2020 the claimant had a telephone conversation with the respondent in which she informed him that she had made contact with the police and told him everything she knew about the allegations of criminal exploitation, blackmail, threats of violence and fraud allegations that had been made. She says that she spared the respondent no details but did not reveal the names of the informant women to him.**
>
> **42. The claimant says that the respondent [then this is inverted commas which I take to be verbatim from her witness statement] 'went ballistic and accused me of lying. He accused me of making more trouble for Saraya Hussain because I was jealous. He said he would sack me because he had [there is a missing word, I take it, had] enough of my lies and attacks against Saraya Hussain."**
>
> **43. The Tribunal accepts the claimant's account of the telephone conversation on 26 January …**

It seems to me that that must involve a clear finding of fact that Mr Mahmood did say that he would dismiss her because of what she was telling him on 26 January 2020. I am therefore bound to agree that having made the clear finding of fact at paragraphs 41 to 43, it was perverse of the Employment Tribunal later to say what they did at paragraph 311. Again, I do not think Mr Perry really contends otherwise. I can only think that they inadvertently overlooked the earlier finding and it seems to me on that basis that the case must be remitted to the ET to consider its findings at paragraphs 311 to 313 and whether what was said amounted to a detriment on the grounds of one or more protected disclosure.

15. It also seems to me, as submitted by Ms Murphy, that given the nature of the particular detriment, namely threatening dismissal, it is right that the Tribunal should also in this context reconsider their conclusion as to whether the reason, or principal reason, for the dismissal may have been the fact that Ms Cohen had made protected disclosures. That is contrary to their clear finding at paragraph 328. Although I am bound to say that, given the time lapse between the telephone conversation in January 2020 and the dismissal in January 2021 and the very firm finding at paragraph 328, it

seems to me unlikely that the Tribunal will change their view, I nevertheless accept Ms Murphy's point that the finding about the reason for the dismissal may be infected by the Tribunal overlooking their earlier finding of fact, particularly as the nature of the detriment was a threat to dismiss, so that issue should also be reconsidered, in my view, by the Employment Tribunal.

16. The net result of all this is I dismiss Mr Mahmood's appeal, I allow Ms Cohen's appeal in relation to the finding at paragraph 311 and I will remit the case to the same Employment Tribunal to consider the impact of this on their conclusions at paragraphs 313 and 327 to 328 in the judgment.

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