



EMPLOYMENT TRIBUNALS

Claimant: National Association of Colliery Overmen, Deputies and Shotfirers ("NACODS")

Respondent: (1) UK Coal Kellingley Limited (In Liquidation)
(2) Secretary of State for Business, Energy and Industrial Strategy

Heard at: Sheffield **On:** 15 and 16 May 2018

Before: Employment Judge B Hodgson

REPRESENTATION:

Claimant: Mr R Bailey, Counsel
First Respondent: No attendance or representation
Second Respondent: Mr A Crammond, Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that the claim is dismissed by reason of lack of jurisdiction, it having been presented outside of the statutory timescale in circumstances in which it was reasonably practicable to have presented it in time.

REASONS

Procedural Background

1. These are claims in substance seeking a declaration of a protective award, in favour of that group of former employees of the First Respondent dismissed by reason of redundancy for whom the Claimant was recognised by the First Respondent for collective bargaining purposes, pursuant to section 189 of the Trade Union & Labour Relations (Consolidation) Act 1992.
2. At a preliminary hearing held by telephone on 17 January 2018 the matter was listed for a further preliminary hearing to consider the following issues:

- 2.1. Was it reasonably practicable for the Claimant union to present its claim during the period of 3 months beginning with the date of the last of the dismissals to which the complaint relates?
- 2.2. If not, was presenting the claim on 9 November 2017 a reasonable time thereafter

Facts

3. The facts were determined by the Tribunal on the balance of probabilities, having heard the evidence, both oral and documentary, and considering the submissions of the parties' representatives.
4. The parties produced an agreed bundle of documents and references to pages within this Judgment are references to the page numbers of such bundle. The bundle was supplemented by copies of the pleadings in Case No 1800370/2016 between National Union of Mineworkers ("NUM") (Claimant) and Secretary of State for Business Innovation & Skills & Others (Respondent).
5. The Claimant called its President, Mr Terence Fox, to give evidence. It is acknowledged that Mr Fox has sat for many years as a lay member of Employment Tribunals. No oral evidence was called on behalf of the Second Respondent.
6. Thoresby and Kellingley were respectively two of the last three deep coal mines operating in the UK. On 9 July 2013 the businesses of Thoresby Colliery and Kellingley Colliery were transferred from the ownership and operation of UK Coal Operations Limited to UK Coal Thoresby Limited and UK Coal Kellingley Limited respectively.
7. Confirmation of the transfers was given by letter dated 9 July 2013 addressed to Mr Soar, General Secretary of NACODS (page 194). The letter asked Mr Soar to note that the "recognition arrangements with the National Association of Colliery Overman[sic], Deputies and Shotfirers in respect of Monthly Paid Supervisors at Thoresby Colliery and Kellingley Colliery have transferred to UK Coal Thoresby Limited and UK Coal Kellingley Limited respectively."
8. A brief background as to the Trade Union representation of employees working at the two mines needs to be given. A number of unions are involved in the representation of the various members of staff at the mines. For historical reasons, the majority of miners at Thoresby Colliery (being based in Nottinghamshire) are members of the Union of Democratic mineworkers ("UDM") with a minority being members of the NUM. Conversely, at Kellingley Colliery (being based in Yorkshire), the majority of miners are members of the NUM with a minority being members of the UDM. There are also other recognised unions for the mine staff.
9. NACODS represents, and has sole bargaining rights for, the group of employees that can, in summary, be categorised as "supervisors". The supervisors are, at both Thoresby and Kellingley, a separate group in terms of bargaining unit to the miners.

10. The evidence of Mr Fox, which was not challenged and is accepted by the Tribunal, is that the basic employee structure was materially identical at both Thoresby and Kellingley Collieries both before and after the transfer of ownership and operation.
11. Traditionally, it has been the case at both Thoresby and Kellingley that although more than one union may be representative of certain categories of staff, a specific union has taken the lead, sometimes exclusively, when it comes to negotiating various aspects of pay and conditions and, by custom, the outcome would be accepted across all employees irrespective of individual union representation or bargaining unit.
12. At Thoresby Colliery, staff were dismissed by reason of redundancy from April 2014.
13. Employment Tribunal proceedings were commenced by the UDM seeking a declaration of entitlement to a protective award. The Tribunal has not had sight of the pleadings but Judgment in that case ("the Thoresby Judgment") was promulgated on 20 January 2016 (page 110). The Tribunal has not had sight of any reasons for the Judgment. It is noted on the Thoresby Judgment that reasons were given orally at the hearing and it is understood that no formal written reasons were subsequently requested.
14. Paragraph 3 of the Thoresby Judgment reads as follows:

"The Employment Judge makes a protective award in respect of *all employees of the Respondent* (emphasis added) at its Thoresby Colliery who were dismissed as redundant on or after 1 April 2014 and orders the Respondent to pay those employees remuneration for a protected period of 90 days beginning on 1 April 2014."
15. It had been the understanding of NACODS that those proceedings were intended to be brought on behalf of all employees at Thoresby Colliery notwithstanding the fact that the UDM were the only claimant.
16. NACODS had not been aware of the Thoresby Judgment being promulgated on 20 January 2016 but began to receive enquiries a short time thereafter from its members, some of whom had, as far as they were concerned out of the blue, received payments from the Secretary of State. They had not understood why they were receiving such payments. NACODS explored the matter, became aware of the Thoresby Judgment, and entered into correspondence, both with its own members and the Secretary of State, to seek to ensure that all its members were paid protective awards. It is understood that all such payments were made without objection by or on behalf of the Secretary of State
17. In the meantime, Kellingley Colliery had also shut down, the last redundancies being effective as at 31 December 2015.
18. The various unions, following internal discussions, agreed that it was appropriate to seek a declaration of a protective award also in respect of the Kellingley closure. As the NUM were the largest union at Kellingley in terms of number of members, it was agreed that the NUM would bring the claim. Again

it was the understanding of NACODS (as with the other unions) that the claim was to be brought on behalf of all employees.

19. Whilst initially this may have been the intention, it appears that the position evolved in the course of the proceedings such that those employees represented by NACODS were clearly not going to fall within the ambit of any judgment subsequently issued. The NUM did not appraise NACODS of the evolving position nor did NACODS make any enquiry of the NUM as to how the claim was progressing.
20. The claim was contested and ultimately Judgment ("the Kellingley Judgment") was given (pages 111 to 172). The Kellingley Judgment, as seen by the Tribunal, is indicated as being signed on 28 July 2017 and the evidence given, and not disputed, is that it was promulgated on or about 2 August 2017. It was given as a Reserved Judgment together with full written reasons.
21. Paragraph 3 of the Kellingley Judgment states:

"The first respondent is ordered to pay remuneration, calculated in accordance with section 190 of the Trade Union and Labour Relations (Consolidation) Act 1992, to all employees dismissed on or after 21 May 2014 in respect of whom the claimant union was recognised by the respondent for collective bargaining for the protected periods."
22. Notwithstanding the quoted wording of the Kellingley Judgment, the Employment Judge wrote to the NUM asking for a list of their members so that the same could be annexed to the Judgment in order – apparently - to identify, specifically, those members of staff to whom the Judgment applied (albeit not until 19 September 2017 - page 178).
23. Following promulgation of the Kellingley Judgment, Mr Fox was contacted by telephone by Mr Kitchen (General Secretary of the NUM) on 8 August 2017 to be told that the Judgment had been issued. Mr Fox has no clear recollection of precisely what was said in that telephone conversation but effectively he was notified of the fact of the Kellingley Judgment and the group of employees in whose favour it had made a declaration. To quote his witness statement (see paragraph 23), "I was initially unsure as to its implication and we [NACODS] decided we would seek clarification".
24. Mr Fox was subsequently sent a copy of the Kellingley Judgment by email. Again, Mr Fox's recollection of when he received the Judgment is unclear. His recollection is that he was on holiday during the very early part of August and will have had sight of the Judgment only upon his return (notwithstanding the discussion said to have taken place on 8 August), The best estimate he could give of having actual sight of the Kellingley Judgment was mid-August.
25. Mr Fox's evidence was that he did not seek any legal advice at that stage, notwithstanding being unsure as to the Judgment's implications. Rather surprisingly, given the issues to be determined at this preliminary hearing, he again could give no precise indication as to when he did first seek legal advice other than it will have been prior to 6 October 2017. In consulting, by agreement, with his Counsel, it was confirmed that Counsel did in fact give a

written opinion on 3 October 2017 and therefore it is accepted by Mr Fox that he sought legal advice a short time prior to that date.

26. Paragraph 24 of Mr Fox's witness statement sets out a relevant time line of actions taken by him subsequent to receipt of the Judgment, none of which is in dispute and is accepted by the Tribunal.

Statutory Framework

27. With regard to statutory law, in respect of the time within which a claim under section 188 must be presented, the relevant section is s189(5) TULRA which states:

- (5) An [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal –

- (a) before the [date on which the last of the dismissals to which the complaint relates] takes effect, or

- (b) [during] the period of three months beginning with [that date], or

- (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented [during the] period of three months, within such further period as it considers reasonable.

28. This in substance is the same wording as set out in section 111(2) of the Employment Rights Act 1996 and it is agreed and accepted by all parties that case law regarding the interpretation of the provisions of section 111(2) applies equally to section 189(5)

Submissions

29. The Tribunal received very helpful written skeleton arguments which were accepted as final submissions from both Counsel to which they each spoke.
30. It was agreed by both parties that the burden of proof in this preliminary issue rests with the claimant.
31. Mr Crammond, in his Skeleton Argument at paragraphs 22 – 25, sets out caselaw interpreting the relevant statutory provisions and these principles were accepted by Mr Bailey
32. Additionally, the Tribunal specifically referred Counsel to the line of authorities indicating that Trade Union representatives, as with solicitors, also count as "advisers" and, if they are helping a Claimant with his or her case, they are generally assumed to know the time limit and to appreciate the necessity of presenting claims in time. Specifically the representatives' attention was drawn to the line of authorities including Times Newspapers Limited v O'Regan 1977 IRLR 101, Alliance and Leicester PLC v Kidd EAT 0078/07 and London Borough of Islington v Brown EAT 0155/08. The Tribunal expressed surprise that this line of authorities, which on the face of matters was potentially relevant, had not been addressed by either Counsel and they were given the opportunity to do so when making their oral submissions.

33. Mr Crammond's position was that he had, by inference, alluded to this argument in his skeleton argument and his submission, essentially, was that a union acting for itself was acting as "adviser" to itself. Mr Bailey argued that a union acting for itself was not in the same position as a union acting as adviser to a member. If that were the case then, by analogy, every solicitor acting in person would not be entitled to rely upon the reasonably practicable argument. Whilst Mr Bailey accepted that this line of cases was a factor to be considered, it was not, in his view, definitive.

Discussion and Conclusions

34. There was a degree of uncertainty as to the precise trigger date for these claims, being the last date upon which redundancies were effective. It may have been earlier in December 2015 but the parties were in agreement that the absolute latest date was 31 December 2015
35. Taking 31 December 2015 as the trigger date, the final date for presenting claims within a three month period would be 30 March 2016.
36. There was an initial attempt to present the claim on 2 November 2017 although that (for reasons that are not entirely clear) was rejected. It was re-presented and ultimately accepted on 22 November 2017. For the purposes of this preliminary hearing (particularly given the uncertainty over the reason why the claim was initially rejected), the Tribunal accepts the date of presentation as 2 November 2017.
37. It is not in dispute therefore that the claim has been presented some nineteen months out of time.
38. The first question for determination is whether or not it was reasonably practicable to have presented the claim in time.
39. The essence of the Claimant's argument is as follows:
- 39.1. by agreement between all the relevant unions, the UDM alone issued the proceedings which ultimately led to the Thoresby Judgment. The other unions were not parties to the proceedings
 - 39.2. the Thoresby Judgment covered "all employees"
 - 39.3. the Secretary of State paid the appropriate awards to all employees
 - 39.4. when it came to Kellingley, it was assumed (certainly by NACODS) that the Thoresby scenario would be repeated.
 - 39.5. accordingly, NACODS did not seek to be a party to the proceedings which ultimately led to the Kellingley Judgment
 - 39.6. that misunderstanding as to the legal position was a misunderstanding widely shared, including by lawyers
 - 39.7. in all the circumstances, it had not been reasonably practicable to have issued the claim in time.

40. Is that set of circumstances sufficient to render it not reasonably practicable for NACODS to have issued its own proceedings, in time, in respect of the employees for whom it had sole collective bargaining rights?
41. The Tribunal considered fully each of the elements set out in Mr Bailey's argument as follows.
42. On the question of what can be described as "ignorance of the law", the claimant's position is that the various matters set out by Mr Bailey at paragraph 24 of his Skeleton Argument show ongoing confusion notwithstanding the case of *TGWU v Bauer Coley Limited* [2007] ICR 226 which clearly set out to clarify and give certainty on this particular point.
43. It is not possible for this Tribunal (even if it considered it appropriate to do so) to determine whether the Thoresby Judgment was correct or not in law. The Tribunal does not have the necessary background in terms of the full facts or the pleadings and no written reasons have been produced. It appears on its face however to go beyond the position clarified in the Bauer case given the background evidence of the equivalence of staffing and representation at the two collieries given by Mr Fox.
44. Does however the fact of the Thoresby Judgment give proper and reasonable grounds to an experienced Trade Unionist who sits as a Tribunal lay member (as Mr Fox is described) to simply assume that he can rely on that to the extent that there is no need to issue proceedings in respect of a different legal entity in a separate geographical location, irrespective of the combined history and clear similarities, if not repetition, of operation and staffing?
45. The Tribunal concludes it does not. There is, and has been since the Bauer Judgment, legal certainty as to the position. It was not reasonable on the part of NACODS to make assumptions that it was entitled to leave the proceedings in the Kellingley claim to be brought by the NUM notwithstanding the Thoresby Judgment and any agreement reached between unions.

Acquiescence/Complicity

46. The highest Mr Bailey puts this is that whilst neither the representatives of Kellingley (to put it at its widest) nor anybody on behalf of the Secretary of State are said to have made actual misrepresentations, they have encouraged Mr Fox's belief by virtue of the fact that the Secretary of State paid out across the board under the Thoresby Judgment.
47. The Tribunal accepts that the Secretary of State's conduct can be said to be relevant (see paragraph 27 of the Claimant's submissions in which Mr Bailey qualifies his reference to "estoppel") but rejects the overall argument. The Thoresby Judgment is not a Judgment in proceedings to which the Secretary of State was a party. It gives a clear statement as to entitlement on its face and it is perhaps not surprising under such circumstances that the Secretary of State has paid out in accordance with the wording of the Judgment. Certainly the Tribunal cannot accept that the mere fact of payment entitled Mr Fox reasonably to believe that any future claims, taken by whichever Union,

concerning an operation run by a different legal entity at a different geographical location, would result in the same outcome.

48. There is no other suggestion of any other conduct or action (or inaction) on behalf of the Secretary of State that could in any way amount to "acquiescence/complicity"

Knowledge/ignorance/reasonable practicability

49. The illustrative cases to which Mr Bailey refers concern litigants in person. This is not such a case. This case concerns a Trade Union as claimant.
50. Neither party could refer the Tribunal to any reported case in which there has been a definitive determination in which it is said that a Trade Union acting as a party is in effect advising itself or not. It is clearly open to argument that NACODS wrongly advised itself that it could rely on the Thoresby Judgment when deciding how to deal with the Kellingley claim.
51. Mr Fox himself, given his personal circumstances of being an experienced Trade Union official who has sat as a lay member of Employment Tribunals over many years ought to have been aware of the position and, if he was not, he could have taken legal advice.
52. The Tribunal's conclusion is that such a given set of circumstances is not of itself determinative (in that it automatically leads to a conclusion that it was reasonably practicable to have issued in time) but it is another factor to be considered in the overall factual matrix.
53. The legal position was perhaps unclear prior to the Bauer case but the judgment in that case was intended to remove any doubt as to the correct position in law. It is surprising that NACODS and Mr Fox specifically appear to have had no knowledge of the Bauer case. These are the type of proceedings that are often, indeed predominantly, taken by Trade Unions.
54. It cannot, in the Tribunal's view, be that this misunderstanding – notwithstanding the various bases upon which it is put – can properly be said to amount to matters which reasonably prevented interfered with and/or hindered NACODS from bringing their claim within the appropriate timeframe.
55. The Tribunal in reaching this conclusion considered the various individual arguments both separately and in combination.
56. That conclusion finalises the matter. However, the Tribunal, for the sake of completeness also considered the second limb of the test, in the event that its primary conclusion was found in any way to be wrong.
57. On NACODS own case, it became aware of the potential problem when Mr Fox was told of the effect of the Kellingley Judgment on 8 August 2017. At its highest it could potentially be argued that it did not have conclusive knowledge of the position until actual sight of the written Judgment a short time thereafter.

58. Accordingly, at that time, it knew that it was not covered by the Judgment and any claim it may itself have to make to protect its members was a long time out of date.
59. For reasons unknown or unexplained, it decided not to take immediate Tribunal action or legal advice but rather took the decision to see whether voluntary payment to those it represented may be forthcoming.
60. Mr Bailey submits that it only became reasonably practicable for NACODS to have issued proceedings towards the end of October.
61. The Tribunal has fully considered the subsequent actions taken by NACODS
62. On the evidence produced to the Tribunal, it did in effect nothing until 29 August when Mr Fox first made contact by telephone with the Government Legal Department ("GLD").
63. There followed exchanges with various individuals at the GLD, the Redundancy Payment Service and those representing the company in liquidation.
64. The Tribunal sees nothing whatsoever in those exchanges which suggests that the approach for voluntary payments was being favourably considered, one example being the e-mail of 19 September 2017 (page 177) which states "In the meantime with regards to your members, you will need to provide evidence as per the list you provided to me last week, fits the description to whom the PA is awarded [sic]". Similarly, the e-mail of 26 September 2017 (page 181), which states "... can you please confirm the basis upon which it is claimed that the individuals on your list are covered by a protective award made by the Tribunal". Nor can it be said from reading the e-mail exchanges that any encouragement at all was being given that NACODS members may be paid out on a voluntary basis.
65. Legal advice was sought it appears towards the end of September. The Tribunal has not of course had sight of that legal advice but even then, following receipt of the advice in early October, a claim was not presented until 2 November 2017 at the earliest.
66. Mr Bailey submits that the actions of NACODS following notification of the Kellingley Judgment were effectively the same actions they had taken following receipt of the Thoresby Judgment. The Tribunal does not accept that. There is a material difference between seeking payment under the specific terms of a judgment as opposed to seeking to persuade the Secretary of State that payment should be made on a voluntary basis notwithstanding the precise wording of a judgment.
67. The Tribunal concludes that, if it were the case that it was not reasonably practicable for NACODS to have presented their claim within the three month timescale, that position ended upon having the knowledge that their members were not covered by the Kellingley Judgment – potentially 8 August 2017 but certainly no later than when Mr Fox had sight of the written Judgment shortly thereafter.

68. There was nothing to prevent NACODS seeking voluntary payment having issued a claim urgently to seek to protect their members' position. There is no explanation forthcoming as to why they did not do so.
69. The Tribunal's clear conclusion is that, were it not to have been reasonably practicable for a claim to be presented in time, it was not presented within a reasonable period thereafter and the claim would have been struck out on this basis also.

Employment Judge B Hodgson

Date: 12 July 2018

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