Appeal No. UKEAT/0163/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 September 2012

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

MRS C L WILLIAMS APPELLANT

THE MINISTRY OF DEFENCE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR N CAIDEN (of Counsel) Instructed by: Scott Moncrief & Associates LLP 7-19 Greenwood Place London NW5 1LB
For the Respondent	MS M WHEELER (of Counsel) Instructed by: Treasury Solicitors Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

JURISDICTIONAL POINTS – Excluded employments

The Claimant was in the RAF. Before presenting a discrimination claim to the Employment Tribunal she was required to go through the service complaints procedure. On her failing to appeal internally in time, the complaint was treated as withdrawn and the Employment Tribunal correctly held it had no jurisdiction. There was no breach of Art 6 ECHR or EU obligations to provide an effective remedy.

A new point was not allowed to be argued. **Celtec** applied.

HIS HONOUR JUDGE McMULLEN QC

Introduction

1. This is an appeal by the Claimant in those proceedings against a judgment of Employment Judge M Emerton sitting alone at a PHR at London South, for which reasons were sent to the parties on 19 December 2011, extending to some 18 pages. The parties were represented respectively by Mr Nathaniel Caiden and Ms Marina Wheeler of counsel.

2. The Claimant contended that the Tribunal had jurisdiction to hear her complaints of discrimination made against the Ministry of Defence which denied that there was such jurisdiction; it would also, if the case went on, make objections on the merits to the Claimant's case but they do not arise at this stage.

3. The essential issue mapped out for Judge Emerton at a previous CMD was this:

> **"a. To determine whether the Claimant received the letter to her dated 30 March 2011 from the deciding officer, sent on behalf of the Respondent, which contained the decision rejecting her service complaint and which is referred to at paragraph 4 of the grounds of resistance dated 6 April 2011, and if so when that was received.**
>
> **b. To determine whether the Tribunal has jurisdiction to hear the claim in view of the Respondent's argument that the Claimant has apparently withdrawn her service complaint pursuant to section 121(1)(b) of the Equality Act 2010, as the Respondent asserts she has not appealed from the decision rejecting her service complaint contained in the letter dated 30 March 2011."**

4. The Judge decided in favour of the Respondent's contention and that the Employment Tribunal claim would be dismissed for want of jurisdiction. The Claimant appeals, directions sending this to a full hearing were given by HH Jeffrey Burke QC indicating in his opinion that the case did not have much chance of success but this was a recondite area of the law with little authority and so a full hearing was set up. This recondite area has had light shone onto it most recently by Silber J in **Molaudi v Ministry of Defence** UKEAT/0463/10, relied on in the Notice of Appeal, affirmed by the Court of Appeal in the judgment of Hooper LJ [2012]

EWCA Civ 576 given on 21 March 2012, the day before Judge Burke gave his opinion in this case but he did not cite either.

The legislation

5. The legislation is not in dispute. First, many of the complaints in this case would be based upon the anti-discrimination measures set out in section 120(1) of the **Equality Act 2010**. But section 121 provides as follows:

> **"(1) Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as member of the armed unless -**
>
> **(a) the complainant has made a service complaint about the matter, and**
>
> **(b) the complaint has not been withdrawn"**
>
> **(2) If the complaint is made under the service complaint procedures, it is to be treated for the purposes of subsection (1)(b) as withdrawn if -**
>
> **(a) neither the office to whom it is made nor a superior officer refers it to the Defence Council and**
>
> **(b) the complainant does not apply for it to be referred to the Defence Council"**
>
> **(5) The making of a complaint to an employment tribunal in reliance on subsection (1) does not affect the continuation of the service complaint procedures…"**

6. The right to complain of matters affected by the Equality Act is dealt with by the **Armed Forces Act 2006**. Section 334(1) provides that a person subject to service law, who thinks himself wronged, may make a complaint. The way in which a complaint is handled is dealt with in the **Armed Forces Redress of Individual Grievances Procedures and Time Limits Regulations 2007**. So far as is relevant to the present dispute, these are they:

> **"20. The prescribed officer who considers a service complaint shall notify the complainant in writing of his decision, stating the redress, if any, that he has decided to grant, giving the reasons for his decision and notifying the complainant of his right to make an application under regulation 21.**
>
> **21. (a) Upon notification by the prescribed officer of the decisions referred to in regulation 20, the complainant may apply to the prescribed officer in writing for the service complaint to be referred by the prescribed officer to a superior authority.**
>
> **(b) In his application, the complainant shall state his grounds for applying for referral of the service complaint, and the application shall be signed and dated by the complainant.**

(c) If the application is made in accordance with these regulations, the prescribed officer shall refer the complaint to the superior officer or, if the prescribed officer thinks it appropriate, to the Defence Council.

22. Unless regulation 23 applies, an application under regulation 21 may not be made after the later of:

(a) three months after the date on which the matter complained of occurred, and

(b) six weeks after the complainant receives the notification under regulation 20.

23. An application under regulation 21 may be made on a date after the end of the period provided for in regulation 22, if the prescribed officer decides that it was not reasonably practicable for the application to have been made at an earlier date."

7. Two Treaty obligations arise; first under article 6 of the ECHR, the right to a fair trial; and under the Equal Treatment Directive, a right to an effective remedy must be provided by member states within the European Union.

The facts

8. Mrs Williams entered the RAF in 2002 as a nurse. She raised a number of complaints on 22 September 2010. On 22 October 2010, she presented a claim to the Employment Tribunal. It was stayed by a number of extensions until 9 March 2011. On 30 March 2010 a decision was made by the commanding officer of the unit of the RAF where the Claimant was engaged, Colonel H Tuck. It was recorded in his outcome letter which was sent on his direction on 31 March 2011 to the Claimant. She did not receive it. The Respondent was directed by the Employment Tribunal to serve its response to the claim on 6 April which it duly did.

9. Correspondence ensued between the solicitor representing the Claimant and the Treasury Solicitor representing the Ministry of Defence, the proper Respondent in the proceedings. From this it is apparent that the Claimant was asserting she had not received the outcome letter from Colonel Tuck. That was the finding of the Judge. The response form had stated the Respondent's position that it had sent the outcome letter to the Claimant and that she had 30-days in which to register what we would call an appeal under the above regulations.

10. There never was an appeal. According to the correspondence in June 2011, those representing the Claimant asserted that they had never seen the outcome letter. Treasury Solicitors enquired why this had not been made plain earlier. On 15 June 2011, the Treasury Solicitor wrote this in respect of the outcome letter:

> **"Dear David,**
>
> **I attach a copy of the letter from the Respondent to your client dated 30 March 2011 which is referred to paragraph 1 of our list of issues dated 10 June and also at paragraph 4 of the Response dated 6 April. This is emailed to you without prejudice to our assertion that your client received this letter and did not appeal from the decision contained in it as we have set out at paragraph 1 of our list of issues dated 10 June.**
>
> **I am assuming that you have authority to accept this copy letter on behalf of your client but if your client wants our client to send it direct to her as well then please let me know."**

11. There never was a response to the imprecation that if the solicitor for the Claimant did not have instructions to accept the letter, something should be done about it; nothing was.

12. On 22 June the Respondent, recognising that there was a dispute as to the jurisdictional issues, suggested in an application that there should be a PHR to determine this issue:

> **"Does the Tribunal have jurisdiction to hear the Claim in view of the Claimant's apparent withdrawal of her service complaint pursuant to section 121(1)(b) of the Equality Act 2010 as she has not appealed from the decision on her service complaint contained in the letter from the Respondent to her dated 30 march 2011?"**

13. This letter and the list of issues in the application were regarded by the Claimant as a watershed in her response to Colonel Tuck's outcome letter. The position she adopted was that she thought she was, by this letter, not being given the decision of Colonel Tuck and that the time limit of 30 working days had already expired. Yet elsewhere in her dealings, she contended that she had only seven days to comply with it, which I take it to be the difference

between either 15 and 22 June, or 22 and 30 June, but in either event they are inconsistent with her primary case.

14. The Judge found that the Claimant's solicitor had received the copy of the outcome letter on 15 June and that between 15 and 30 June the Claimant read it. So being as generous to her as could be, time began to run from 30 June according to both the regulations and the express terms of the outcome letter.

15. The PHR was conducted on 13 December with reasons sent shortly thereafter. On 23 December the Claimant made the only appeal and thus it follows that if time began to run from 30 June for 30 days, the appeal letter was some four months out of time.

16. There then followed correspondence dealing with the matter. The Claimant's full case was set out in her appeal letter of 23 December and it is from this letter that there emerges her contention that she had effectively seven days in which to respond. She puts that negatively, only seven days, but as a matter of law in the field of extensions under, for example, the **Employment Rights Act** it could be put positively that she had seven days to respond. I will return to this matter in due course.

17. The response of the prescribed officer, this time Group Captain C S Walton, the commanding officer replacing Colonel Tuck, was to consider in full the arguments the Claimant had put forward. In the light of those reasons and the reasons of the Judge, he rejected the Claimant's application for an out of time submission of the appeal letter. Group Captain Walton referred to this passage from the Judge's reasons:

> **"s. The Claimant's sworn oral evidence to the Tribunal was that the *only* reason that she did not respond to the letter and request that the complaint be referred to superior authority, was**

> **because she believed that the 30 day period had already passed. Although this would appear to be an illogical response to the wording of the letter, and her own stated explanation that this was the first she had received it, that was nevertheless her explanation. It should be noted that although the Claimant's witness statement embarked on a lengthy and legalistic complaint over Warrant Officer John's investigation, the appropriate way of despatching correspondence to her, and that she never received a letter direct from Colonel Tuck, her oral explanation … was simply that set out above…."**

18. The Judge went on to hold that time began to run from the date on which the Claimant had read the outcome letter, that is from 30 June 2011. The Judge applied the judgment in **Gisda Cyf v Barratt** [2010] UKSC 41 and the judgment to **Molaudi** to which I have referred. The Judge went on to say this:

> **"One of the more general matters raised by the Claimant is that the general purpose of European Law, the Equality Act 2010 and Article 6 of the European Convention on Human Rights, all suggest it is of fundamental important that the Claimant's rights are not impeded. That is doubtless correct. However, the Tribunal places considerable emphasis on the EAT's judgment case of *Molaudi*; although on a different issue, the judgment is clear on the point that the Parliament has decided to enact certain provisions to ensure that the service complaints are dealt with internally by the Armed Forces and only reach Employment Tribunal jurisdiction in certain specified circumstances. As Silber J put it at paragraph 28, "…the purpose of the statutory scheme is to ensure that the complaint of racial discrimination by the soldier us in the first instance determined by a body deemed by the legislature to be the appropriate body to resolve such disputes with the Employment tribunal being the body dealing with this matter at the next stage." Like Silber J, I also intend to consider the natural and ordinary meaning of the legislative words in their context, and the purpose of and intentions of the legislature in enacting them. I have no difficulty in interpreting the clear words of the legislation: I do not, in practice, consider that there are any difficulties in construction, or any need to adopt any unusual interpretation required by Article 6 of the other matters referred to by Mr Caiden. Plainly Parliament intended that the Employment Tribunal should not have jurisdiction if a Service Complaint was abandoned. Furthermore, the Claimant, once she had received the text of the decision complained of, could with the help of her solicitors have challenged it in the specified manner. It does not sit well with her arguments, that she might be prevented from progressing her Tribunal claim, in the circumstances where she had all the information needed to take the next step, but chose not to for reasons which appear to be somewhat flawed. To that extent, she was the author of her own misfortune. Incidentally, I also note that Silber J's relatively forceful comments that judicial review provides an effective remedy for challenging administrative decision regarding complaints, and on the same basis, I accept that if the Claimant applied for her complaint to be referred to superior authority and Colonel Tuck refused to do so, (1) the Tribunal would have no jurisdiction to overturn that decision, but (2) it could be challenged by way of judicial review in the Administrative Court."**

19. Mr Caiden contends that there is no finding in this paragraph as to reasonable practicability because the Judge was guarded, as is said in paragraph 41, for he did not want to fetter the possibility that Colonel Tuck might find in favour of the Claimant's application to allow her out of time appeal. He contends that this is not a finding on reasonable practicability by a Judge.

20. The Judge construed the regulations and upheld the Respondent's submission that the Claimant had received notification pursuant to regulation 20 on 30 June 2011 and had not appealed within 30 days.

Discussion and conclusions

21. The first argument of Mr Caiden is one of simple construction. His written proposition, following his client's stance earlier, was that the regulations require that Colonel Tuck himself notify the complainant in writing of his decision, that there be a direct transmission from the commanding officer to the nurse of the decision which he had made. That function cannot be delegated to Treasury Solicitor, or to any other. By parity of reasoning, I suppose this would require Nelson himself to affix his pre-Trafalgar signal to the yardarm, or the commander at Marathon to displace Pheidippides in his famous and fatal run. In court today he resiled from that position and conceded that an officer could direct that his decision be notified to the complainant by an intermediary, in this case a junior officer, with the junior officer putting it in the outgoing mail and the Royal Mail then sending it off to the Claimant. Thus with commendable sense Mr Caiden accepts that in the real world the requirement is met provided that the decision maker is identified, the reasons for the decision maker's decision are given, that they are given in writing and that the complainant has the right to appeal within the requisite period. In my judgment, that is all that is required.

22. On Mr Caiden's equally literal argument, the only decision in writing of Colonel Tuck is the one signed by him which has got lost. He was content for that to be transmitted by those under his command. Mr Caiden accepts that what happened on 30 and 31 March 2011 was in accordance with the regulation; notification to the complainant was sent. What was missing was its receipt. The Judge concluded by reference to regulation reg 22(b) that notification was

only effective when received by the Claimant, or it might be after she had had a reasonable opportunity to receive it, applying **Gisda Cyf** principles. What there is, as of course everywhere in the real world, is a copy and that has been served. It does not have his signature. It is plainly his decision and reasons. The office copy is no less compliant with regulation 20 for want of the signature. Regulation 20 does not require specific engrossment, delivery as a deed or a seal. The loss of the only signed letter of 31 March does not invalidate the decision, require it to be taken afresh, or to be signed and dated again.

23. The Respondent in its response form asserted that the outcome letter had been sent. That was greeted with silence by the Claimant and, with respect, I agree with the sense of surprise of the Treasury Solicitor when she says in effect "Why did you not mention earlier that you had not got this outcome letter? It is after all, a critical document in the case for this runs everything else in the case". How could the Claimant and her solicitor sit idly by when they are told that there has been an outcome letter? Events moved on and when it became clear to the Treasury Solicitor that the Claimant was asserting that she had not received it, a copy was sent.

24. In my judgment, there is no distinction between the circumstances on 31 March and on 15 June 2011. The client of the Treasury Solicitor in every real sense is Colonel Tuck; he is the one who has received the investigation report and who has made the decision. Treasury Solicitors would be taking instructions from him in order to answer the Claimant's case on behalf of the Ministry of Defence. So while a person can act on behalf of Colonel Tuck, that is the junior officer on 31 March, so can the Treasury Solicitor on 15 June. It is accepted by Ms Wheeler that a report by the Treasury Solicitor of what Colonel Tuck said would not qualify under the regulations, but here his actual words in full have been given, absent his signature. A copy document submitted by a solicitor on behalf of her client under this regulation has the same effect absent the signature. The whole of the decision therefore, absent the commanding

officer's signature was sent on 15 June. In the circumstances, I hold the Claimant's solicitor had authority to accept the copy as the outcome letter under reg 20. Thus whatever fear the Claimant had about time running out while she was not in receipt of Colonel Tuck's letter must be seen in light of regulation 22 (b) that time did not run, until on the Judge's finding, 30 June 2011.

25. I do not consider the fact that this arose following exchange of pleadings in this case changes that simple factual conclusion. Nor do I consider that it "let off" the Claimant from taking the steps which she should have taken to appeal this when a list of issues was sent by the Respondent. Logically that must have been regarded as an issue since 6 April 2011 when the response was put in and the articulation of it and the application for a Pre-hearing Review is simply a logical outcome of the defence. And so, the Judge was correct to hold that there was compliance with the regulations.

The new point

26. The regulations were said by Mr Caiden to be in breach of the Article 6 ECHR right to have the out of time issue determined by an independent authority. As Ms Wheeler properly contends, as this was not the argument put to the Employment Tribunal and it is a new argument on appeal, why should I allow it? The law on new points on appeal is clear. As the House of Lords said in **Celtec v Astley** [2006] 635 HL, para 100, expressly upholding my approach to the law and practice given in **Leicestershire v Unison** [2005] IRLR 920, new points should not be taken on appeal except in certain circumstances, see for example my judgment in **Secretary of State v Rance** [2007] 665 EAT. This is not one of them.

27. However, I have heard argument on it and in deference to Mr Caiden's late submissions, I will deal with it but I make it clear that I am doing so only if I am wrong in refusing to allow it

to be raised. It is a root and branch attack on the ability (in regulation 23) of the prescribed officer to decide what is reasonably practicable; this is misconceived. Parliament has decided that the prescribed officer makes the decision and gives reasons. It has also decided that the same officer decides the out of time issue. That does not seem to me to be a breach of the right of the Claimant to have her complaint dealt with in an independent way, after all if the matter were to be wholly independent, then Parliament could have decided there be some internal procedure that did not involve the commanding officer of the particular unit. It decided not to do it. In my judgment the approach in regulation 23 is fully consistent with Article 6.

28. In any event, as Silber J made clear in **Molaudi**, if there is a failure by Colonel Tuck, or in this case, Group Captain Walton, to abide by simple principles of justice in applying the regulations then this matter is amenable to judicial review, see the comprehensive statement in the following terms:

> **"37. In any event the law of this country does (in the words of paragraph 2 of the Directive) provide 'judicial and/or administrative procedures. are available to all persons who considers themselves wronged by failure to apply the principle of equal treatment to them…'. The critical factor is that any decision by the military authorities to reject for any reason a complaint made by a serviceman on the basis that it does not meet the requirements of a 'service complaint' can be the subject of an application for judicial review (see for example *Crompton v United Kingdom* [2009] ECHR 42509/05 [79]). I should add that no attempt has been made to challenge by judicial review or otherwise the decision of the service authorities that the complaint purporting to be a 'service complaint' and made by the Claimant's solicitors was made out of time."**

29. Silber J's holding on out of time service complaints in **Molaudi** is directly applicable in this case and I can do no better than cite Hooper LJ, in turn citing Sir Richard Buxton in the Court of Appeal when he said this;

> **"4. The issue in the case relates to a rule that a member of the armed forces cannot bring a claim for racial discrimination in an employment tribunal unless he has already brought a service complaint. In order to bring a service complaint a member of the armed forces must bring that complaint within a limited period of time. The appellant did not do that and, in any event and as was found, there was no justification for extending the time limit. The issue before Silber J was to interpret the relevant legislation on the requirement that there had been a valid service complaint.**

5. For the reasons Silber J gives, this appeal is quite unarguable and I propose to do no more than read out and to incorporate into this judgment the reasons given by Sir Richard Buxton who looked at this matter very carefully:

> **'Silber J was right to conclude that regulation 14 imposes a jurisdictional bar: see for instance §30 of his judgment. Moreover, if that were not so, in every case an applicant who was out of time would be able to do what this applicant wishes to do, and litigate before the ET the question of whether the prescribed officer should have exercise his discretion to extend time. It is quite clear that the statutory structure was intended to exclude that enquiry from the ambit of the ET's jurisdiction. That conclusion does not involve any failure to respect Directive 2000/43. As Silber J pointed out in his §§ 35-36, the principle of effectiveness does not preclude a member state from imposing reasonable procedural limitations on the pursuit of a complaint. That conclusion is self-standing and does not depend on the availability of judicial review, though Silber J was justified in considering, judgment §37, that there was an *additional* reason why the regulation did not involve a breach of the principle of effectiveness.**
>
> **This application therefore fails in any event. I am bound, however, to add that in the actual factual circumstances of this case the application is unreal. By his letter of 12 March 2010 to the applicant's solicitors the prescribed officer set out a series of factual reasons why he had concluded that it would not be just and equitable to extend time. I have not found any suggestion in the papers before me that any of those reasons were unfounded, so the application remains academic. Those advising the applicant will wish to reflect on that aspect of the case before seeking to pursue the application further.'**

Order: Application refused."

30. That in my judgment deals with the new complaint about the involvement of the prescribed officer in deciding the substantive merit *and* deciding reasonable practicability in relation to an out of time appeal. But, as a matter of fact Mr Caiden's complaint cannot get off the ground. The heart of his complaint is that the same officer who decides the substance should not under Art 6 principles decide the out of time issue. It is commonplace in Employment Tribunals to have such a dual role: the Employment Judge who decides at first instance handles any application for a review and decides if it is out of time. In every jurisdiction, when a judge makes an order with a time for compliance, if time goes by the same judge determines whether to allow an extension and relief from sanctions. Further, as it was not Colonel Tuck who made the second decision, but was a different commanding officer with no prior involvement, as a matter of fact this Art 6 point cannot succeed. That disposes of what I would regard as the construction point.

Effective remedy

31. The points raised by reference both to the ECHR and to the Equality Directive deal with the effective bar of the Claimant now from the Employment Tribunal by the determination that there has been, by lapse of time, a withdrawal. It is plain that procedural matters, provided that an effective remedy is given, are for the member states, see **Ashingdon & UK** [1987] 53DR 269 and the citation of those principles in **Unison v Brennan** [2008] IRLR 492 at paragraphs 49 and 50 citing the ECJ judgment in **Preston v Wolverhampton Healthcare NHS Trust** [2000] IRLR 506. When that case came back to the EAT [2004] IRLR 96, I gave a judgment and there was never any argument as to the right of the UK to introduce measures as to time limits for the presentation of a claim for equal pay. I do not consider that the Claimant has been barred from an effective judgment by the operation today of the time limit in regulation 23. She has, as a matter of fact, been given the opportunity which she took on 23 December to argue her case on reasonable practicability.

32. The Judge made a very sensible finding although as I have said, he was anxious not to bar the deciding officer from making such a decision. But the prescribed officer has now decided it, and it seems to me that I could assist the parties by giving my view on it. On the facts found by the Employment Judge, his conclusion in paragraph 22 is plainly borne out. The Claimant has not given an effective response as to why she did not move when she read the copy letter in the latter part of June 2011, and like Group Captain Walton, I would be unimpressed by her reasoning. I do not know why she sat on her hands and did not activate the procedure. In doing so and in taking an impossibly literal approach, she has done herself no service and has lost the opportunity to raise her complaints at a higher level than Colonel Tuck. Maybe it is a consolation to her to know that a different commanding officer has dismissed them, perhaps not. But for what it is worth, since the issue would now turn on whether it was reasonably

practicable, there is an independent officer, Group Captain Walton, who has decided the matter. It is consistent with the observations made by an Employment Judge and both of those seem to me to have considerable merit.

Disposal

33. I would very much like to thank Mr Caiden and Ms Wheeler for their help in this case. The appeal is dismissed.