Appeal no UKEATS/0036/18//SS

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EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET EDINBURGH EH3 7HF

At the remote Tribunal

On 15th January 2021

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

MS OCHUKO DAFIAGHOR-OLOMU APPELLANT

COMMUNITY INTEGRATED CARE RESPONDENT

Transcript of Proceedings

JUDGEMENT

APPEARANCES

For the Appellant	Mr Stephen Smith Solicitor Livingstone Brown Solicitors 84 Carlton Place Glasgow G5 9TD
For the Respondent	Mr Alasdair Hardman Counsel Instructed by Wrigleys Solicitors 19 Cookridge Street Leeds West Yorkshire LS2 3AG

SUMMARY

In this case the Claimant lodged a Notice of Appeal that covered both an original judgement and a reconsideration judgement. The Notice was refused at sift insofar as it incorporated grounds of appeal arising from the reconsideration judgement on the basis that it was incompetent to appeal two orders arising from separate hearings in a single Notice of Appeal. On learning of the sift judge's decision the Appellant lodged a new Notice of Appeal covering the grounds of appeal she wished to state against the reconsideration judgement. It was rejected by the Registrar as out of time. The Appellant submitted that the Registrar should not have rejected the second Notice of Appeal. Held that provided the Notice of Appeal made it clear that the Appellant sought to appeal the original judgement and the reconsideration judgement and both appeals were lodged within the time limits set by the Rules, the Notice of Appeal was competent to bring under appeal both the original judgement and the reconsideration judgement. Held further that had it been necessary to consider the matter, an extension of time would have been granted to permit the second Notice of Appeal to be received.

Code 8 – Practice and Procedure.

A **Introduction**

1. The issue that arises in this appeal is a procedural one. The Appellant won her claim for unfair dismissal by decision dated 27 February 2014. She sought reinstatement. That was refused by oral judgement dated 12 January 2016. She appealed that decision and on 31 October 2017 was successful in her appeal. The matter was remitted back to the Employment Tribunal. The Employment Tribunal again refused to order reinstatement by decision dated 28 August 2018. I shall refer to the decision as "the Reinstatement Judgement". She appealed against this decision.

2. She then lodged two motions for reconsideration. The first dated 10 September 2018 was refused. No appeal is taken against this decision. The second dated 11 September 2018 was refused on 18 September 2018. I shall refer to this decision as "the Reconsideration Judgement". The Appellant appealed the Reconsideration Judgement.

3. The procedural difficulty I am asked to resolve emerges from the inclusion of the grounds of appeal against both the Reinstatement Judgement and the Reconsideration Judgement in one Notice of Appeal. Grounds of Appeal A and B were challenges to the Reinstatement Judgement and Ground C was a challenge to the Reconsideration Judgement. The sift judge considered that it was impermissible to aggregate Grounds A, B and C in a single Notice of Appeal and that a separate Notice of Appeal should have been lodged against the Reconsideration Judgement. As a consequence, Ground C did not pass sift.

4. The Appellant applied for a hearing under rule 3(10). On 18 October 2019 at a rule 3(10) hearing I accepted that the appeal against the sift judge's decision on ground C had reasonable prospects of success. I have therefore heard a full appeal on the issue of competency raised by ground C and the merits of ground C.

5. I also heard an appeal from a decision of the Registrar to refuse a second Notice of Appeal. Having learned that Ground C had been refused at sift on grounds of competency the Appellant lodged a separate Notice of Appeal which contained Ground C. It was lodged well outside the period of time allowed by the rules for appealing a Reconsideration Judgement. The Appellant sought leave to have this Notice of Appeal received late. The Registrar refused to permit time to be extended. The Appellant appeals this decision and

asks me to extend time so as to permit the new Notice of Appeal containing Ground C to be argued.

Is it Competent to appeal two orders in one Note of Appeal?

6. The first issue for me is whether it was permissible to include Ground C in the Notice of Appeal against the Reinstatement Judgement. Mr Allison who represented the Appellant drafted the Notice of Appeal. He was in a situation that I was told does not arise very often. When he identified Ground C as a ground of appeal, the Appellant was still within the 42 days permitted under Rule 3 for an appeal against the Reinstatement Judgement. She was therefore in a position to state her appeals against the Reinstatement Judgement and the Reconsideration Judgement in one Notice of Appeal. I was told that normally the 42 days for appeal have expired before a party is in a position to state an appeal against a reconsideration judgement. Mr Allison accepted that an appeal against reconsideration should be in a separate Note of Appeal if 42 days from the original judgement had expired (see rule 71 which gives a party 14 days to appeal a reconsideration judgement).

7. Mr Allison did not consider that there was any reason in principle why Ground C should not be included in the Notice of Appeal against the Reinstatement Judgement. He argued that the appeal was against the disposal of the Appellant's motion for reinstatement. Although there were two orders, one refusing reinstatement after the hearing and another refusing reinstatement after reconsideration, the effect of both orders was the same. Although the orders proceeded on different grounds taken together both disposed of the same application. In his submission there was no procedural obstacle in the way of stating all three grounds of appeal in one Notice of Appeal.

8. He submitted that practical concerns also played a role in his decision. He did not have Legal Aid for a new Notice of Appeal and had he applied there would have been delay and additional expense. In that circumstance he included Ground C in the Notice of Appeal.

9. The Notice of Appeal (Joint Bundle no. 17) refers at paragraph 3 to the Reinstatement Judgement. At paragraph 5 it refers to the Reconsideration Judgement. Paragraph 6 sets out the grounds of appeal. Ground C is introduced with these words. "Lastly the Employment Tribunal erred in law insofar as it refused to reconsider its judgement". It then identified

that judgment as the judgement of 18 September 2018 and set out four errors of law said to have been perpetrated.

10. I do not consider the approach Mr Allison would be productive of uncertainty. The document although combining the appeals in one document distinguishes the appeal against the Reinstatement Judgement and the appeal against the Reconsideration Judgement. A different state of affairs would exist if the Notice of Appeal failed to distinguish the two. Paragraphs 3 and 5 draw attention to both judgements and Ground C states an appeal against the Reconsideration Judgement.

11. Mr Allison pointed out that the Employment Appeal Tribunal Rules 1993 do not require a separate Notice of Appeal. He pointed out that the Employment Appeal Tribunal Practice Direction 2018 (as amended) does not require a separate Notice of Appeal. Although Mr Allison is an experienced employment law practitioner, he indicated that he was not aware that it was the Employment Appeal Tribunal's practice to require an appeal against a reconsideration judgement to be stated in a separate Notice of Appeal in a case where the days of appeal against the original judgement had not yet run their course.

12. The Respondents argued that notwithstanding the absence of a rule requiring appeals against reconsideration judgements to be stated in a separate Notice of Appeal, general principles of civil procedure indicated that this was the proper course. It was pointed out that the order disposing of the Reinstatement Judgement is distinct from the order disposing of the Reconsideration Judgement. The arguments advanced and disposed of in the Reconsideration Judgement were distinct from those advanced and disposed of in the Reinstatement Judgement. It was submitted that the Appellant could not appeal two distinct orders in one appeal. They also relied on **Rineker v City & Islington College Corporation** (UKEAT/0495/08) which states that usual practice in the Employment Appeal Tribunal is for appeals to be separated.

13. In assessing these arguments, I note that rules on appeal are contained in rule 3. It states (so far as material) -

> 3.— Institution of Appeal
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> (1) Every appeal to the Appeal Tribunal shall, subject to paragraphs (2) and (4), be instituted by serving on the Tribunal the following documents—

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(a) a notice of appeal in, or substantially in, accordance with Form 1, 1A or 2 in the Schedule to these rules;

(3) The period within which an appeal to the Appeal Tribunal may be instituted is—

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(a) in the case of an appeal from a judgment of the employment tribunal–

(i) where the written reasons for the judgment subject to appeal–

(bb) were reserved and given in writing by the employment tribunal

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42 days from the date on which the written reasons were sent to the parties;

14. I note that in the Rules of the Court of Session an appeal has the effect of bringing all prior interlocutors under review (ROC 38.2) except those that either expressly or by implication have become final. In this case that rule of civil practice would not assist the Appellant since it would suggest that the appeal of the Reinstatement Judgement could not open up a subsequent order viz. the Reconsideration Judgement. I have come to the conclusion however that I should not seek guidance from the rules of civil practice. Reconsideration is not part of ordinary civil procedure and I am not convinced that ROC 38.2 is relevant to the issue in this case. See also **Neary v St Albans School for Girls Governors** [2009] EWCA Civ 1190 paragraph 47.

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15. As it seems to me the issue is whether there is any rule or case that prohibits the use of one Notice of Appeal where the appellant wishes to challenge both an original judgement and a reconsideration judgement. If there is not, the question is whether there should be. There are strong arguments both ways. There is no express rule. That being so the question is whether there is authoritative guidance in the case law. I begin by assessing that matter.

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16. In **Rineker** the employment tribunal struck out Ms Riniker's claim. The claimant appealed the strike out decision by Notice of Appeal. Separately she sought a review (or reconsideration as it is termed now). Her motion was refused. She then sought to appeal the refusal of reconsideration out of time. That motion was also refused by the Registrar and then on appeal refused again by HHJ Clark. The claimant then sought to amend the Notice of Appeal so as to incorporate her challenge to the reconsideration decision. The

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EAT gave two grounds for refusing her appeal. First it stated that usual practice was to treat an original judgement and a review judgement as separate. In that situation Ms Riniker should have lodged a second Notice of Appeal. I have no doubt that HHJ Richardson's comments about normal practice are correct. They are supported by HHJ Ansell and HHJ Clark (paragraph 51). HHJ Clark (quoted at paragraph 51) affirmed the "settled practice in the Employment Appeal Tribunal. A fresh Employment Tribunal judgement or order post-dating an earlier Notice of appeal against a previous judgement or order will require a fresh Notice of Appeal within the 42 day time limit". Second it noted that Ms Riniker was using the amendment to circumvent the rules. She had already sought an extension of time so as to lodge her appeal against reconsideration late. This was refused. She had appealed the Registrar's refusal. The appeal was dismissed. In this situation it was illegitimate to amend the Notice of Appeal since the grounds that she sought to introduce had already been ruled to be out of time.

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17. **Riniker** is very different from the present case. The Employment Appeal Tribunal disposed of the appeal on two grounds. As HHJ Richardson makes clear the appellant in that appeal was seeking to introduce a ground of appeal by the "back door" that is by amending a ground of appeal into an otherwise timeous Notice of Appeal. The ground of appeal in question had already been rejected. I agree with HHJ Richardson that it is not legitimate to revive a moribund ground of appeal by seeking to amend it into another timeous Notice of Appeal. The ground in question had been presented out of time. It had been rejected by the registrar. The appellant appealed the registrar's decision and the appeal was refused. In my opinion this ground of appeal could only have been kept alive by means of a further appeal. A spent ground of appeal may not competently be introduced in a Notice of Appeal containing other live grounds of appeal by way of amendment. In that connection I agree with HHJ Richardson.

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18. The other ground of disposal founded on by HHJ Richardson has caused me greater difficulty. If normal practice has the force of law and applies to the present case, then two documents rather than one should have been lodged in this case. In the circumstances we know that both would have been lodged at the same time. Both would have been Notices of Appeal. Both would have been in the same format. All that would distinguish them is that the first would contain grounds A and B and the second ground C. The Employment Appeal Tribunal having received both documents would have

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allocated a new reference to the reconsideration appeal. But thereafter the two appeals would then have been conjoined so as to enable the whole matter to be considered together and avoid the risk of contradictory outcomes. They would have been treated as one appeal for all practical purposes.

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19. I am reluctant to reject ground C on such formal grounds. I can see that if normal practice were followed that would have the benefit of making it clear that there are two appeals. I can also see that separate Notices of Appeal would make it easier to monitor time limits where, as here, different time limits apply to different orders.

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20. But I am mindful of rule 2A in the Employment Appeal Tribunal Rules 2013. Rule 2A enjoins me to deal with the appeal justly and indicates that regard should be had in this connection to considerations of fairness (2A)(2)(c) and cost (2A(2)(d)). Where, as here, the Notice of Appeal appeals both orders and does so in express terms, where both appeals were within their respective time limits, where both appeals arose from the same remedies hearing and where the form of Notice in both cases would have been the same, it seems to me that to insist on two Notices, and thus to reject ground C would be unjust and unfair. The Notice of Appeal is worded so as to make it clear it is a combined Notice. I have no reason to doubt Mr Allison's observations about the delay and additional expense involved in lodging a second Notice. That being so cost is also a factor that I consider I should take into account.

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21. Normal practice is a weighty consideration particularly where, as here, the practice has been affirmed by the Employment Appeal Tribunal in **Rineker**. In that circumstance it becomes more than a practice but a practice sanctioned by law. But I also have to be alive to the possibility that the practice affirmed may not extend to the facts of this case. I have to be alive to the possibility that the practice approved in **Rineker** was a practice appropriate to cases like **Rineker**. In other words where an appellant seeks to amend existing grounds of appeal so as to include a ground that is out of time or lodges a Notice of Appeal out of time, normal practice requires the amendment or Notice to be in a separate Notice of Appeal. The wisdom of that approach is that it avoids confusion. The issue is whether **Riniker's** approval of normal practice extends to a Notice of Appeal that combines two appeals that are within statutory time limits. There is no question of procedural subterfuge. There is no risk that the Employment Appeal

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Tribunal will be misled into allowing an appeal to be argued that is out of time. In this situation a practice that required two Notices of Appeal would serve no useful function. In these circumstances I am attracted to the argument that the present case should be distinguished from **Riniker** and that the normal practice is not applicable to the facts of this case. I accept that the Employment Appeal Tribunal should be flexible in its approach to such matters and should seek to avoid excessive formality. It should also be alive to the desirability of avoiding cost and delay. A separate Notice of Appeal would have caused delay and expense. I consider one document can fulfil two distinct legal purposes provided those purposes are closely connected, are clearly set out and there is no consequent transgression of any other rule. I acknowledge the administrative benefits of an inflexible rule. I acknowledge that the decision I have taken may cause uncertainty in some cases. I consider however that to take the course urged on me by the Respondents would be a triumph of form over substance. I consider that the Rules discourage such an approach.

22. I am therefore of opinion that the sift judge should not have rejected ground C. Where the appeal follows from a single hearing and the second order appealed against is in effect an iteration of the first, where the appeal days for both orders are still current and where the Notice of Appeal makes it clear that it is a combined appeal against both the original order and the reconsideration order, I consider that a single Notice of Appeal is competent.

23. For completeness I should state that I did not find **Maresca v Motor Insurance Repair Research Centre** [2005] ICR 197 to be of any assistance. The case does not address the issue before me.

Should the Registrar have Refused the Second Note of Appeal?

24. It may be that my conclusions in connection with Ground C will be appealed. That being so it is appropriate that I should express my view on Mr Allison's alternative submission. I was asked to accept that conjoining grounds A and B with ground C did not raise an issue of competency. It was submitted that this was a case of procedural irregularity. In this situation the dispensing power under rule 39 was available to cure the irregularity. Rule 39 provides

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> 39. - (1) Failure to comply with any requirements of these Rules shall not invalidate any proceedings unless the Appeal Tribunal otherwise directs.
> (2) The Tribunal may, if it considers that to do so would lead to the more expeditious or economical disposal of any proceedings or would otherwise be desirable in the interests of justice, dispense with the taking of any step required or authorised by these Rules, or may direct that any such steps be taken in some manner other than that prescribed by these Rules.

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25. When the sift judge disallowed Ground C the Appellant lodged a further Notice of Appeal on 4 December 2018 and asked the Registrar to permit the ground although late in exercise of the dispensing power in rule 39. The Registrar rejected the application on 24 April 2019. The Appellant asks me to reconsider the decision to refuse an extension of time. I acknowledge that following **United Arab Emirates v Abdelghafar** [1995] ICR 65 and **Green v Mears Ltd** [2019] ICR 771 the Appellant can have no expectation of indulgence. I consider however that there are special circumstances in this case. The ground of appeal in question had already been notified to the Respondents and the error was entirely procedural in character. I can see no prejudice to the Respondents.

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26. Mr Hardman pointed out that the 34 day delay was a lengthy one. The delay was not however as a result of ignorance of rule 3 and the 42 day time limit. Mr Allison was aware of it. The Appellant did not consider that there was a delay. Once the sift judge issued her decision the Appellant moved quickly to lodge a second Notice of Appeal. I do not consider that paragraphs 9 and 10 of the Registrar's decision are in point. This was not a case where the appellant's representative was ignorant of the time limit. The registrar did not consider that the Notice of Appeal made it clear that there was an appeal against both the Reinstatement Judgement and the Reconsideration Judgement (paragraph 12). I do not consider that is a fair reading of the Notice of Appeal. The Notice of Appeal sets out the details of both the Reinstatement Judgement (paragraph 3) and the Reconsideration Judgement (paragraph 5). Ground C states that it is an appeal against the Reconsideration Judgement. I am unable to accept that "there is no explicit reference in the Notice of Appeal that it is intended to cover two separate decisions".

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27. I also notice that this was a case where the Appellant's leave to remain the UK depended on her employment status. I consider this factor weighed in her favour. Mr

Hardman pointed out that the case had been wending its way through the Employment Tribunal for a long period of time. He did however accept that the lengthy delays were not attributable to the fault of the Appellant. Although therefore the case had been substantially delayed, I did not consider that this was a basis to refusing to exercise my discretion in favour of the Appellant.

I would therefore have granted the Appellant's appeal against the Registrar's order.

28. The Appellant made a motion to withdraw her second Notice of Appeal ((UKEATPAS0124/18/SS) if I acceded to her primary motion. Given that I found in her favour in connection with the competency issue, I will allow her to withdraw the second Notice of Appeal. If at a later stage the Court concludes I was in error in relation to Ground C, then I consider that that she should be at liberty to argue that her second Notice of Appeal should be received.

Conclusion

29. I allow the Appellant's appeal. As I understand it the appeal on the other grounds B is sisted at present to await the outcome of this appeal. In that circumstance it would appear to me that I should fix a Full Hearing on grounds B and C.