



Following rules

Deshpal Panesar and Paul Gurnham discuss judicial interpretation of the Employment Tribunals Rules of Procedure 2004

IT IS NOW A LITTLE OVER NINE MONTHS since the current Employment Tribunals Rules of Procedure came into force, setting out a series of mandatory requirements for someone bringing or defending a claim in the employment tribunal. Two new cases give a telling insight as to how those rules and requirements will be interpreted by the tribunals and the EAT.

There appears to be a significant difference of approach between those who drafted the rules, and those who are applying them.

Purpose and context of the rules.

These new rules came into force at the same time as, and go hand-in-hand with, the new statutory workplace dispute resolution procedures. Like those procedures, they arise out of the Employment Act 2002. When proposing that act and that package of legislation to the House of Lords for approval in February last year, Lord Sainsbury on behalf of the Department of Trade and Industry was quite clear as to what the new legislation was intended to achieve. Referring to disputes at work as expensive, stressful, and disruptive for all involved, he stated:

"The main aim of those provisions can be simply put. It is to encourage employers and employees to resolve disputes through workplace dialogue, rather than through litigation."

The statistics as to the precise effect of the new rules and procedures are still being compiled. However they do appear to be having the effect of significantly reducing the number of cases that end up in litigation.

The Employment Tribunal Service annual report, published in July, was telling as to the reduction in applications registered. In the year to March 2005, 86,181 claims were regis-

tered at employment tribunals in comparison with 115,042 claims in the previous year – a decrease of over 25 per cent.

Other factors may have contributed to that downturn; 2004 saw a large number of multiple party claims, and working time cases have become less common. It may further be the case that we have experienced a 'bubble', while those who would otherwise have claimed are going through dispute resolution, or while claimants generally get to grips with the new requirements of bringing a claim. However, it is tolerably clear that the downturn is more than just coincidence and new rules are having the effect of reducing the number of claims before tribunals.

How the rules are being applied by the courts

The Rules set out a series of matters that must be included in a claim form or response before it will be accepted by a tribunal. Ostensibly that would appear to be a sensible approach. The President of the EAT recently described the requirements of the rules as follows:

"On the face of it the new Rules are extremely welcome, whereby there is a gateway to ensure that applications or responses kick off on a sensible and complete basis from the beginning, so that there is no need for subsequent clarifications. In the first instance, the ET secretary and, in the second instance, the chairman are the guardians of those gateways."

However, in practice, strict application of the rules has led to a number of cases being refused at first instance. Further, the degree to which a claimant is expected to comply with those requirements has recently led the EAT to criticise the rules and suggest that they should be re-drafted.

Recent cases

The EAT has considered the approach tribunals should take to the acceptance or rejection of claim forms in two recent cases. From those cases it emerges very clearly that the EAT and tribunals will not prevent claims from being heard or defended on the basis solely of technical breaches of rules. That approach, common sense though it is, is in stark contrast with the rules taken at face value.

Rule 1 deals with the process of bringing a claim. Whereas previously a letter with the relevant details would suffice, now claimants are required to use the prescribed claim form, which is self-explanatory.

Rule 1(4) sets out nine items labelled '(a)' to '(i)' which are described as "required information". If the claim does not set out all the relevant "required information", including "details of the claim", it is provided by r 3(2) that the Secretary of the Employment Tribunal shall not accept the claim.

If the Secretary does not accept the claim he must then refer the matter to a chairman in accordance with r 3(3)-(5) who will then decide, subject to a power of review, whether a claim is to be accepted or rejected.

That approach, of not accepting claims that do not comply with the requirements of the rules departs significantly from the previous regime. For many years previously the approach taken by tribunals and the EAT was that if parties failed to comply with requirements of an ET1 or ET3, then in most cases the matter was dealt with by accepting the application or the response as valid, and dealing with inadequacies by way of subsequent directions or applications for further information or further and better particulars. Now a specific test has been set out for a claim to be valid.

Grimmer v KLM Cityhopper UK [2005] IRLR 596 EAT

On 17 March 2005, the case of *Grimmer v KLM Cityhopper UK* came before HHJ Prophet in the EAT. In that case he considered the requirements of r 1 and the extent to which compliance with them should be required before a claim was permitted to proceed before the employment tribunal.

Mrs Grimmer submitted a claim to the Employment Tribunal. She indicated that she had no representative acting for her but was assisted by the TGWU. She filled in the details requested of her on the form IT1. In Box 1, which asked her to give the type of complaint she wanted the tribunal to decide, she put down:

"FLEXIBLE WORKING."

In Box 11, which asked her to give details of her complaint, she attached a statement which said:

"The company's business argument for refusing my application is based upon their assumption that, if they concede to my request, others would be requesting similar / same working arrangements."

She duly received a letter from the Employment Tribunal stating that her claim could not be accepted and had been referred to the chairman for failure to provide "details of her claim" and a statement to the effect that she had not complied with the statutory grievance procedures.

She quickly instructed solicitors who made clear that Mrs Grimmer had raised an appropriate grievance, but the chairman rejected the application again, on the grounds that details of her claim had not been provided as required by r 1(4).

The EAT allowed Mrs Grimmer's appeal. In doing so HHJ Prophet defined the test for "details of the claim" for the purposes of the Rules as being "whether it can be discerned from the claim as presented that the claimant is complaining of an alleged breach of an employment right which falls within the jurisdiction of the Employment Tribunal".

His criticism of a strict application of the rules went further. He stated:

"The Rules cannot be seen in isolation.

The chairman, unlike the secretary whose functions are administrative has, as an independent judicial person, to do more than merely run down a checklist. He or she must have in mind the overall interests of justice. It is a very serious step to deny a claimant or for that matter a respondent the opportunity of having an employment rights issue resolved by an independent judicial body, ie, an employ-

ment tribunal. Most chairmen would not wish to feel forced to do so without their being a very good reason."

He cited Neill J in the 1983 case of *Burns International Security Services (UK) Ltd v Butt* [1983] ICR 547, where Neill J stated (albeit in relation to the rules then in force):

"It seems to us that in the field of industrial relations where application forms are frequently completed by individual employees without professional assistance a technical approach is particularly inappropriate..."

"...the rules did not require that the complaint as presented should be free of all defects or should be in the form in which it finally came before the tribunal for adjudication. The purpose of the rules is to ensure that the parties know the nature of the respective cases which are made against them."

HHJ Prophet stated that those who drafted the 2004 rules had failed to have proper regard for those principles. The EAT was of the view in *Grimmer* that what on the face of it might have been regarded in the Rules as a mandatory requirement should not be taken to the point of denying a claimant access to the employment tribunal system. The judgment stated that the threshold for access should, in the interests of justice, be kept low.

Thirdly, the EAT was of the view that a vital principle emerged from a full reading of Neill J's judgment in *Burns*. Namely that, as quoted above, the Rules of Procedure cannot cut down on an employment tribunal's jurisdiction to entertain a complaint that the primary legislation providing an employment right empowers it to determine. If there is a conflict, the Rules must give way.

Richardson v U Mole UK Ltd [2005] IRLR 668 EAT

A similar issue came to be considered by the President Burton J on 9 June. This time, the breach of r 1 that led a claim to be rejected was a failure on the claimant's part to state expressly whether he was an employee of the respondent.

Rule 1(4) provides that a claimant is required to state in the claim form whether or not he was an employee of the respondent. This particular case concerned a claim form that was presented prior to April 2005 and therefore was not required to be on the new form, which has a tick box in relation to the question of whether a claimant was employed or not. However, the claimant did not expressly state she was an employee,

although the fact that she was could be discerned from other matters set out in the form.

Burton J held that in a case such as this, where it would be asserted, and accepted by the respondent if asked by the chairman, that the error in the claim form was an immaterial one, a claim should not be prevented from going forward.

The EAT cited HHJ Prophet's decision in *Grimmer*, but stopped short of the direct criticisms of the rules that he had made. There are however fairly clear indications of how the requirements set out in the rules are regarded in Burton J's judgment.

In describing the tribunal's decision to reject the claim for an immaterial breach in this case, he states (at para 2 of the judgment)

"I am satisfied, however, that this is a situation in which the tribunal acted in what it saw to be the strictest possible compliance with what I have no doubt this tribunal, as do many other employment tribunals, regard as being unsatisfactory Rules."

He expresses sympathy with tribunals who consider the rules to be unsatisfactory and goes on to say that whilst in this case he was able to find a solution that prevented the claim from being rejected (again at para 2), "it must nevertheless be said that the sooner that these rules are looked at again the better".

It may therefore be that the rules are amended in the future, but for the moment they stand as they are.

The approach adopted in *Richardson v U Mole* appears to be that, in a case such as this, where it would be accepted by the parties, that the error was an immaterial one, and where it is quite plain that on a review the claim would have been allowed to go forward, the claim should be accepted when presented to tribunal.

Conclusion

For those who have had a claim or response rejected by the tribunal for a minor breach of the rules, or who are facing a defence on that basis, it is worth noting that the requirements of the new rules are not being allowed by the EAT to prevent otherwise arguable cases or defences being brought. Where the effect of the rules is to do so, it appears they will give way.

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