

THE NEW RULES: ARE THEY WORKING?

By Paul Kirtley

1. The new Tribunal Rules, Part 3 of the Employment Act 2002 and the Dispute Resolution Regulations all came into force on 1st October 2004. In this talk we hope to raise a number of questions regarding the application of the new rules and to indicate the manner in which the tribunals and the EAT are tackling the issues raised.

(A) **Time Limits:**

Following a copy of the claim being sent to the employers, Rule 4(i) Tribunal Rules indicate that there are 28 days from that date in which to present a response. What if the respondents, for one reason or another, fail to present their response within time? The rules, as they stand, at Rule 4(4) appear to provide in clear terms the following: “the application must be presented within 28 days of the date on which the respondent was sent a copy of the claim (unless the application was made under Rule 33(1)) and must explain why the respondent cannot comply with the time limit. Subject to Rule 33, the chairman shall only extend the time within which a response may be presented if he is satisfied that it is just and equitable to do so”.

The Rules clearly envisage that an application to extend time could not be made once the time limits had expired.

The Rules provide at Rule 6(2) that a response shall not be accepted if:

- (a) the response does not include all the required information
- (b) the response has not been presented within the relevant time limits.

Had a default judgment been entered under Rule 8 then an application to have the default judgment reviewed could be made under Rule 33. What if no such default judgment had been entered?

On the face of the rules the respondents would simply be without remedy. This was precisely the approach of the Employment Tribunal in the case of Moroak t/a Blake Envelopes v Cromie (2005) IRLR 535.

Despite what was said on the face of the rules, Mr Justice Burton in the EAT was clearly of the view that a slavish adherence to the rules was not what was intended and neither did it serve justice. In overturning the decision of the Employment Tribunal, the EAT found that the Rules could not have intended to create a lacuna whereby the respondent could make an application to extend time for entering a response:

- (a) if the time limit has not expired, or
- (b) if it has expired that the judgment in default had been entered

but could not do so when no judgment in default has been so entered.

The order of the EAT was that the test be applied, by way of a flexible interpretation of the rules was the same as was expressly provided under Rule 4(4) for an extension of time, or an application under Rule 33 for a review of a default judgment namely that which is just and equitable.

The Tribunal went on to give guidance as to what ought to be taken into account when considering what is “just and equitable” by referring to the 1997 decision of the EAT in Kwik Save Stores Ltd v Swain (1997) ICR 49.

The outcome for the respondents was that the employer’s response, albeit out of time, was to be accepted by the Employment Tribunal.

The time problems do not end there.

(B) **Default Judgments**

The employer in Pendragon plc v Gary Copus (EAT 11.7.05) was out of time in filing a notice of response. The employer concluded that it was not in a position to apply for an extension of time after the expiry of the original 28 day time limit, unless and until default judgment was issued (but see now Moroak v Cromie above). As soon as the employers had notice of the default judgment the employer applied to set this aside relying upon the power to review judgments and decisions under Rule 33. The Employment Tribunal on a strict, and doubtless accurate, analysis of Rule 33 decided pursuant to Rule 33(2) unless the employer gave a good reason for the delay, the Tribunal had no discretion to grant an extension of times. The Tribunal furthermore concluded if it had a discretion it would have exercised the same and would have granted the extension of time. Not unsurprisingly the respondents felt the decision somewhat harsh and appealed to the Employment Appeals Tribunal, where fortunately they had the benefit of Mr Justice Burton sitting as President, doubtless with his earlier decision of Moroak in mind.

The judgment of the EAT expressly identified that the new Rules did not elevate the duty of a respondent to deal with time limits to something of sacrosanct importance. It was still a matter of case management, albeit more stringently supervised and not one of jurisdiction. It was noted that it would have been very easy to have construed Rule 33 so as to provide that unless a Tribunal was satisfied, on an application for an extension of time, that there was a good reason for delay, then the application would have to be refused. In the continuation of a flexible approach to interpretation of the Rules Mr Justice Burton indicated that Rule 33 did not render the absence of good reason determinative of the application. It simply made the same a matter which the Tribunal considered when taking into account the question of an extension of time. The EAT turned to the case of Kwik Save Stores Ltd v Swain (above) and made clear that the same was the appropriate guide to determine the application.

It was emphasised that the responsibility of the defaulting party was to put all relevant documents and other factual material together to explain:

- (i) the non-compliance with the Rules;
- (ii) the basis on which the respondent sought to defend the case on its merits.

The above is often described as the “full and honest” approach.

In determining the application the Tribunal would take account of all relevant factors including:

- (a) explanation or the lack thereof for delay
- (b) the merits of the defence

and weigh in the balance the possible prejudice to each party and reach a conclusion objectively justified on grounds of reason and justice. Or to put the matter another way, a procedural default should not deny adjudication on a case of potential merit.

The above decision of the EAT in Pendragon PLC t/a CD Bramall Bradford v Gary Copus, together with the above decision in Moroak should leave respondents sleeping rather more peacefully in their beds.

(C) **Grievances and the Failure to Lodge**

The comparative generosity with which the failure of a respondent to meet its obligations under the Rules is not necessarily being reflected in the obligations upon a claimant.

In Noskiw v Royal Mail Group Plc (Employment Tribunal) the claimant submitted claims against his employer alleging breach of the Disability and Discrimination Act 1995 in relation to the denying of a pay review, access to training and failing to shortlist for several posts within the company. When completing the ET1 the employee answered in the affirmative to the question as to whether or not he had put his complaint in writing to the respondent, specifying the date of the complaint as the 15th October 2004.

The employers argued that the claimant had failed to follow the relevant procedure under the statutory grievance procedure, and pursuant to Section 32(6) of the 2002 Act, the DDA claim was therefore inadmissible. The Tribunal considered the employer's argument at a pre-hearing review. It focussed on an e-mail that the employee had sent to the employer on the 15th October about the pay review issue, and it also heard evidence from the employee that he had not raised grievances specifically with the employer, as the employer had made it clear to him that if he did raise such grievances they would not be dealt with.

Whilst one may have some sympathy with the employee in the circumstances, the Tribunal held that he had failed to comply with the statutory grievance procedure in that the complaints in the e-mail had been of a general nature and made no reference to disability discrimination. The assertion that raising the grievance would have been futile did not assist him and the Tribunal found that Regulation 11 of the Employment Act 2002 (Dispute Resolution) Regulations exclude non-compliance in only three circumstances:

- (a) where it was not practicable to comply;
- (b) where the victim had been subject to harassment and there is a reason to believe harassment would continue if the complaint was raised in writing;
- (c) or where the complainant or some person known to the complainant might suffer violence or injury to property. (Rule 11(3))

The test is a relatively high one and none of the circumstances applied to the instant case. The claimant's claim was dismissed.

Bear in mind, however, that where a Tribunal has rejected an employee's claim due to the statutory grievance procedure not being complied with, the time for bringing the claim will automatically be extended by 3 months by virtue of Regulation 15. As a result an employee is given another opportunity, after the initial dismissal of his claim, to raise any grievances with the employer and then resubmit the claim before the Tribunal – provided that the grievance is raised not more than 1 month after the expiry of the original time limit for bringing the complaint (Section 32(4) of the 2002 Act).

(D) **Completing the Formal Documentation as Required**

The obligation under the Rules to complete the documentation ensuring that relevant information is provided appears both comprehensive and obligatory (Rule 1(4) for the Claimant and Rule 4(3) for the Respondent.)

Inaccurate or hasty claimants owe much to Judge John Prophet. When Deputy President of the Employment Tribunals, Judge Prophet prepared a well publicised memorandum for the Parliamentary Joint Committee on Human Rights which highlighted a number of concerns about the impact of what became the Employment Act 2002, particularly its potential effect of limiting people's access to Employment Tribunals and their opportunities to enforce rights under employment law.

In the Grimmer v KLM City Hopper (2005) IRLR 596, the female claimant had sought to complain that her request for flexible working for childcare reasons had been refused. She put "flexible working" on her claim form and gave as details of her claim that: "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".

The Employment Tribunal refused to admit the claim on the grounds that she had failed to provide adequate or sufficient "details of the claim" as required by Rule 1(4)(e).

In a powerful decision Judge Prophet stated that it is "a vital principle" that the "Rules of Procedure cannot cut down on an Employment Tribunal's jurisdiction to entertain a complaint which the primary legislation providing an employment right empowers it to determine. If there is a conflict, the Rules must give way."

He was of the view that the above principle which accords with the interests of justice and that those responsible for introducing the Rules do not appear to have had proper regard to the case law which emphasise that the threshold for access should, in the interests of justice, be kept low.

Effectively the EAT ruled that in determining whether a claim form contains the required details of the claim, the test is “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”. If a Chairman thinks that further particulars are necessary, that can be ordered as the case proceeds through the system. In this particular case, the claimant had clearly indicated that she was to pursue a complaint in respect of her request for flexible working and that was sufficient.

The robustly expressed view of Judge Prophet clearly carried weight with the current President, Mr Justice Burton, in the recent decision of Richardson v U Mole Ltd (2005) IRLR 668. The observation of the President was that “the sooner these Rules are looked at again the better”.

The stark verdict of the President related to another hapless claimant, whose unfair dismissal claim was not accepted by the Tribunal because his claim form did not expressly state that he was an employee of the respondents as required by Rule 1(4)(f). The claim was not accepted even though the form included answers to such as “what job you did for your employer” and “the dates of your employment”, which appeared to indicate that the claimant was an employee. The employers never contended that the claimant was not. Mr Justice Burton held on the facts that there was no breach of Rule 1(4)(f) because the claim form sufficiently disclosed that the claimant was asserting that he was an employee. Even if there had been such a failure the error was “wholly immaterial” since whether the claimant was an employee was not in issue.

Relying upon his earlier decision in Moroak Mr Justice Burton ruled that where an error is explicable or immaterial, and the interests of justice so require, a Tribunal should use its power to review its decision and allow through a claim form or a response which does not initially comply with the requirements.

There is more than a hint that the President is of the view that some Tribunals have been construing the new Rules strictly to the letter in order to highlight the anomalies that the Rules are capable of producing. The President had words for those who

adopted such an approach: “much as I sympathise with those Tribunals who are concerned about the Rules as they presently stand, would prefer them to be amended so as to make the position clear, in my judgement there is a power to review.... which enables a Tribunal to do just that justice which Tribunals are keen and conscientious to do, notwithstanding the change of the Rules. What should be, and will be, beneficial, namely the introduction of these gateways, must not be allowed to degenerate into injustice”.

(E) **More Time Limits: Failing to Comply with an Order to Pay a Deposit**

The more generous approach informed the decision of Judge Peter Clark in the EAT in Sodexo Ltd v D A Gibbons (EAT, 29th July 2005). The employee had submitted a claim to the Tribunal; at a preliminary hearing it was determined that the employee had little prospects of success. He was ordered to pay a deposit. The order was posted to the employer’s solicitors but due to an error in the postcode occasioned by the solicitors themselves, the order did not arrive in time and hence the deposit was not paid within the stipulated time limits. When the solicitors became aware of the need to send the deposit to the Tribunal, albeit out of time, the Tribunal rejected the payment and struck out the claim.

Under Rule 20(4) the employee was successful in having the decision reviewed, with the Tribunal determining that there had been an administrative error under 34(3)(a). Additionally the Tribunal found that it was in the interests of justice under 34(3)(e) to permit the matter to proceed.

The employer appealed on the basis that the strike out judgment was not a reviewable judgment under Rule 34(1)(b). Judge Peter Clark found that the strike out under Rule 20(4) was a judgment reviewable pursuant to Rule 28(1)(a) and Rule 34(1)(b) on the grounds that the strike out was a judicial determination that was final as it prevented relitigation of the matter before the Tribunal. It was noted that whilst the order for a deposit is not a reviewable determination by virtue of Rule 34(1), but it was susceptible to “review” in relation to time limits under the general power to manage proceedings pursuant to Rule 10(2)(a).

The EAT also made clear, assisting the less accurate, that review applications would be properly constituted under Rule 35(2) so long as the grounds under Rule 34(3) could be discerned from the document contained in the application. If there was any doubt about it, rather than dismissing or failing to proceed, it was appropriate for the Chairman on his own initiative under Rule 10(2)(b) or the opposing party on application under Rule 11 to seek further information. It was noted, in passing, that the ground for review under Rule 34(3)(e) that “the interests of justice require such a review” should not be interpreted as restrictively as it had been under the previous statutory regime, particularly in the light of the introduction of the overriding objective in Regulation 3.

Another victory for content over form.

(F) **Some Unanswered Questions**

- (i) The claimant may withdraw all or part of this claim at any time (Rule 25(1)).

This procedure must be undertaken in writing and the secretary then informs all the parties of the withdrawal. Where a claim has been withdrawn a respondent may make an application to have the proceedings against the claimant dismissed. Such an application is made in writing within 28 days of the notice of withdrawal (Rule 25(4)). What happens to the proceedings so far as reinstatement is concerned, if dismissal is not requested by the respondent?

In recent Tribunal proceedings in Nottingham the Tribunal determined that it retained an inherent jurisdiction to consider reinstatement of proceedings that had been formally withdrawn under the procedure in Rule 25, but which had not been subject to an application for dismissal from the respondent. The Tribunal, whilst not expressly directing themselves as to the relevant case law, nonetheless undertook a balancing exercise that followed that in Kwik Save Stores Ltd v Swain, to which reference has already been made.

The moral, from the respondent's point of view is if the applicant withdraws ensure that you apply for dismissal.

(ii) Pursuing a grievance through an agent.

Regulation 9 of the Dispute Regulations provides that if an appropriate representative, likely to be a trade union representative or some other form of elected representative, writes to the employers setting out the grievance in respect of certain named employees, then both employer and employee are treated as having complied with the grievance procedure. This has the effect of depriving an aggrieved employee of any uplift under Section 31 on any award made by the Tribunal, even if the employer has done nothing at all to answer the grievance.

If the person through whom the grievance is submitted is not an appropriate representative as defined, would the correspondence relied upon be sufficient to satisfy the statutory procedures? Arguably the fact that there are express provisions dealing with grievances by representatives, it could be said to suggest that those who do not fall within the definition, are not sufficient to satisfy the procedures. Experience is suggesting that Employment Tribunals are giving short shrift to such a proposition, favouring the generality of approach rather than the specific limitation of the definition within Regulation 9(2).

(iii) The Question of "Relevant Disciplinary Action"

Regulation 2 of the Dispute Resolution Regulations defines "relevant disciplinary actions", that is to say matters in respect of which the statutory disciplinary procedures apply, as amounting to "action, short of dismissal, which the employer asserts to be based wholly or mainly on the employee's conduct or capability, other than suspension on full pay or the issuing of warnings (whether oral or written)".

Rather surprisingly the definition does not, therefore, include any sort of warning even if a final written warning. The procedures will apply, however, to matters such as monitoring performance, the consideration by way of extension of a probationary period or even the calling of a meeting to discuss the employee's performance.

Arguably, even though failure to follow the procedures in the circumstances are unlikely to give an employee a cause of action, it will be a breach of statutory duty which can be relied upon in a breach of trust and confidence claim, or potentially as evidence in a discrimination claim. If breach of contract is pursued, a failure to follow procedure is likely to result in an adjustment to the award made to the employee under Section 31.

(iv) Is the Secretary's Decision to Accept a Claim or Response Capable of Challenge?

Whilst much has been said about the potential to review a decision not to accept a claim form or the response, it is arguable that there is no mechanism for challenging the Secretary's decision to accept the claim form or response. There does not appear to be any provision equivalent to that in Section 32(6) of the Employment Act 2002, in relation to claims presented in breach of the requirement to submit a grievance, for the respondent to raise the issue during the proceedings in accordance with the Rules.

There is, arguably a strong proposition, that if the claim or the response does not include the relevant required information it falls outside the jurisdiction of the Tribunal and Rule 3(9) expressly provides: "decision to accept or not to accept a claim or part of one shall not bind any future Tribunal or Chairman where any of the issues listed in Paragraph (2) fall to be determined later in the proceedings".

This is noteworthy. There is no similar provision in relation to the acceptance of responses.

There does not appear to be any EAT decision on the point, although arguably the issue of jurisdiction is so fundamental that the latter analysis may well hold sway.

(iv) And Finally, Time Limits Once Again

The effect of the Dispute Resolution Regulations and the 2002 Employment Act is that if no grievance is lodged within 4 months of the action in respect of which proceedings are to be commenced, then it would appear that no claim can be brought at all. Sections 32(2) and (4) provide that if the employee has not undertaken the necessary statutory grievance procedure then he is not in a position to present a claim more than 1 month after the end of the original time limit for making the complaint.

The matter that arises for consideration is whether the original time limit under Section 32(4)(b) includes or excludes any extension of time that might have been granted under the provisions, particularly in the discrimination legislation for extending time.

There is no definition of the original time limit within the Employment Act 2002. Will it matter whether the extension is that found in relation to unfair dismissal claims, “such further period as the Tribunal feels reasonable” (Section 111 Employment Rights Act 1996) or whether it is the disapplication of the time bar on whether it is “just and equitable to do so” under the discrimination legislation.

A number of cogent arguments suggest that “the original time limit” does not include the jurisdiction to extend time, as it renders uncertain when time begins to run for the purposes of submitting a grievance within 28 days of the original time limit, and it is somewhat at odds with the Dispute Resolution Regulations which defines “normal time limit” in Regulation 15(5) as to expressly exclude any consideration of an extension of time.

However, it does appear unlikely that Parliament would have intended the failure to lodge a grievance within the relevant timeframe should, effectively create a substantive bar to seeking a remedy clearly provided for in the primary legislation of proceeding with the case out of time so long as the necessary test on the balance of prejudice is satisfied. Another thorny question for the Employment Appeal Tribunal.

(G) **And of the Future?**

The overwhelming approach of the EAT has been to take a robust view in the interests of justice to ensure that the rules do not stand in the way of adjudication on cases of potential merit, whether that be on behalf of the claimant or the respondent. Whilst certainty is always an attractive feature in any system of law, it does appear that the Tribunal's desire to see justice done, at least at appellate level, is going to encourage, if not a coach and horses, then perhaps a pony and trap to be driven through the procedural rules. All one can say is that the approach appears to be even handed for both claimant and respondent.