Neutral Citation Number: [2022] EAT 128

Case No: EA-2020-000398-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 August 2022

Before :

HIS HONUR JUDGE SHANKS

- -

Between :

MS LAYLA DEAN- VERITY (formerly ANJUM TAHIRKHELL) **Appellant**

- and -

KHAN SOLICITORS LIMITED **Respondent**

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- -

Chris Buttler QC & Eleanor Mitchell (instructed by Petherbridge Bassra Solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented

Hearing date: 30 June 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant applied for a reconsideration of a judgment of the EJ almost six years after the judgment was promulgated. The EJ refused to extend time for the application and accordingly refused it.

The EAT decided that in considering whether to extend time the EJ had made an error of law in assessing the prejudice to the applicant of not extending time because she had failed to take account of and/or misapprehended facts relevant to that assessment.

In the unusual circumstances of the case the matter was remitted to the EJ to consider extending time again in the light of all relevant circumstances now applying and, if she decided to extend time, to consider the application and whether to revoke the judgment.

HIS HONOUR JUDGE SHANKS:

Introduction

1. This is an appeal against a paper decision of Employment Judge Cox sitting in Leeds sent out on 23 March 2020 whereby she refused an extension of time of nearly six years for an application for reconsideration of a judgment she had promulgated on 7 April 2014, and accordingly refused the application for reconsideration. HH Judge Auerbach allowed the appeal to proceed to a full hearing on the basis of amended grounds of appeal following a rule 3(10) hearing on 3 April 2021.

2. Following an agreement reached between the parties in April 2022 which I describe in more detail below, the respondent has played no further part in the appeal and was not represented at the hearing. It was nevertheless appropriate that the appeal should be fully argued on behalf of the Appellant before a decision was made, as it was skilfully by Mr Buttler QC. In the very unusual circumstances of the case, I have decided to allow the appeal and remit the matter to EJ Cox.

The Relevant Facts

3. The appellant and the claimant below, Layla Dean-Verity, was a director of the respondent solicitors, Khan Solicitors Ltd, along with her then husband Mohammed Khan and Rashid Majid, who were solicitors. She dealt with the company finances. In 2010 the marriage between the claimant and Mr Khan got into difficulties and it finally broke down in May 2012. In September 2012 the claimant was dismissed from her employment with the company on the grounds of serious financial impropriety. In due course she brought a claim for unfair dismissal in the employment tribunal.

4. The case was listed for hearing before EJ Cox on 20 February 2014. At the outset of the hearing the company conceded that the claimant had been unfairly dismissed because she was given no notice of the meeting at which the decision was made and no procedure of any kind was followed. Notwithstanding the poor quality of the witness statements and the inadequacy of disclosure on both sides EJ Cox proceeded to consider the question of remedies and to hear oral evidence from Mr Majid and the claimant.

5. EJ Cox found in the judgment of 7 April 2014 that the claimant had indeed been guilty of serious financial impropriety by carrying out four categories of unauthorized transaction for her own benefit which are listed at paras 25.1 to 25.4 of the judgment. Having made that finding EJ Cox found that if a proper procedure had been followed the claimant would have been fairly dismissed (with the consequence that she would receive no compensation under the **Polkey** principle) and in any event that her compensation should be reduced by 100% on the basis that her dismissal had been caused by her own blameworthy conduct. EJ Cox also said in the course of the judgment that the claimant was one of the most unreliable witnesses she had ever heard and made other criticisms of her.

6. Immediately following EJ Cox's judgment Mr Majid on behalf of the respondent provided a copy of EJ Cox's judgment to the media and publicized it on social media, and also reported the claimant to the police and to the Solicitors Regulation Authority. Although the police decided to take no action against the claimant, Mr Majid applied (unsuccessfully) for a review of that decision. On 7 March 2016 an SRA Adjudicator found that the claimant had breached the **SRA Principles** and the **Solicitors Code of Conduct** by virtue of three of the four types of unauthorized transactions found by EJ Cox and imposed disciplinary sanctions by rebuking her and making a "section 43 order" which had the effect of preventing her working for any solicitors. That decision was in due course upheld by the SRA Adjudication Panel on 12 October 2016 and the Solicitors Disciplinary Tribunal on 3 May 2017. The decision was

based substantially on the findings of EJ Cox in the 2014 judgment and, although the claimant sought disclosure of documents from the respondent in the course of the proceedings, she was not successful.

7. On 22 February 2018 a pre-action letter of claim was sent by Mr Majid and the respondent to the claimant and her former husband Mr Khan. The total proposed claim against the claimant and her former husband was for over £800,000; it was based in part on three of the matters which EJ Cox had found against the claimant. The pre-action letter attached 855 pages of "essential documents". Among those documents were some which the claimant says should have been disclosed before the hearing and fundamentally undermine the findings made EJ Cox, I will refer to these as the "new documents".

8. In October 2018, the SRA Adjudicator was persuaded, partly on the basis of the new documents, to revoke some of the disciplinary sanctions to which the claimant was subject, but this did not include the important factor of the rebuke issued by the SRA. When the claimant later applied for a judicial review in relation to the SRA's failure to set aside the rebuke the proceedings were stayed by consent on 24 January 2020 to allow her to apply to the employment tribunal for a reconsideration of the 2014 judgment.

9. On 20 July 2018 the claimant had also lodged an appeal against the 2014 judgment based on complaints about the conduct of the hearing by EJ Cox and on an application to adduce fresh evidence in the form of the new documents. The EAT Registrar refused an application for an extension of time for bringing the appeal and HH Judge Richardson confirmed her decision at a hearing on 4 February 2019. In the course of his judgment Judge Richardson made the observation that there was an issue whether the EAT should entertain an appeal on the ground of fresh evidence at all rather than require an application to reconsider (see para 29 at p102 of bundle). He also observed that, notwithstanding the SRA proceedings, the claimant had been able to persuade the relevant authorities to allow her to practice as a barrister. He recorded

that the respondent and Mr Majid had informed him of a decision that they would not rely on the 2014 judgment in pleading the claim against her in the High Court or assert that she was bound by any issue estoppel (see para 48 at page 106 of bundle); the High Court claim had been issued a few weeks before the hearing before Judge Richardson on 14 January 2019.

10. The claimant applied for reconsideration of the 2014 judgment on 21 February 2020. The application was supported by substantial submissions and a witness statement which attached hundreds of pages of relevant documents, including the new documents. On 23 March 2020 EJ Cox decided not to extend time for the application which should have been made within 14 days of 7 April 2014 under rule 71of the ET Rules. It followed that the reconsideration application itself was also refused.

11. In the meantime, the High Court claim had continued. On 11 September 2020 the matter came before DJ Goldberg sitting in Leeds. Among other matters the claimant applied for the claim to be struck out on the grounds that it was an abuse of process. DJ Goldberg made the following observations in deciding this application:

> **"36. Outside of these proceedings, [Mr Majid] appears from the uncontradicted evidence before me to have pursued a campaign against [the Claimant] after she left the business, writing to potential employers and legal practitioners, and indeed newspapers, setting out allegations about [her] dishonesty …**
>
> **37. In addition … when the police declined to mount a prosecution of [the Claimant] for her alleged dishonesty, [he] attempted unsuccessfully to force the Crown Prosecution Service to prosecute her.**
>
> **38. I understand the police investigation, including the review, were completed in 2017, and to me these proceedings, and what may have been deliberate delays in the proceedings pre-issue has the air of exacting some form of retribution against [… the Claimant], which is extraordinary for a professional practice. They have gone to lengths which are extraordinary to try to have [the Claimant] pilloried by their own fellow professionals."**

Taking those matters into account along with the delays, the respondent's inability to formulate a coherent claim and their failure to conduct the High Court proceedings properly,

DJ Goldberg decided that the High Court claim amounted to an abuse of process and struck it out.

12. Mr Majid and the respondent appealed against DJ Goldberg's decision and were later granted permission to appeal; among the grounds of appeal was that the judge had " *(…) failed to place any or any proper weight on the conclusions reached by the Employment Tribunal in 2014*." (see para 7(g) at page 452 of bundle).

13. On 26 October 2020 the claimant made a further application for reconsideration of the judgment of 7 April 2014 based on the developments in the High Court claim. On 27 October 2020, the employment tribunal responded saying that it had nothing to add to the decision of 23 March 2020 because substantially the same application for reconsideration had already been made and refused. In the circumstances I consider it is open to me to take account of these developments in deciding the appeal in so far as they are properly relevant to the decision to refuse the extension of time.

The Agreement between the parties

14. In April 2022 the parties the appellant and the claimant below, Layla Dean-Verity, was a reached a comprehensive agreement bringing an end to the High Court proceedings. The agreement also provided that the respondent would take no further part in this appeal and that, if the judgment of 7 April 2014 was set aside following a reconsideration (in which the respondent would take no part), the Claimant would discontinue her claim in the employment tribunal.

EJ Cox's Decision

15. EJ Cox approached the application for a reconsideration by first considering the question of extending time as a separate matter. She noted that the substantive application was based on

the claimant's contention that new documents had not been available at the original hearing because of the respondent's failure to make disclosure and that the "interests of justice" therefore required a reconsideration; however, she made no assessment of the merits of the reconsideration application save to say that she was prepared to assume that if there was a reconsideration there would be a "*reasonable prospect of [the tribunal] deciding to revoke its decision and take it again, taking into account the new documents*" (see para [3]).

16. She noted that time limits for challenging tribunal decision were important because they ensure that matters are dealt with without delay and that there can be finality to litigation (see para [8]). She considered the delay in bringing the application at every possible stage and said that she was "(*…) not satisfied that there are good and cogent reasons for the Claimant's very substantial delay in presenting this application*" (see para [9]).

17. She said that she did " *(…) not accept that refusing to extend time would cause the Claimant substantial prejudice*" (see para [10]), observing that the reason the tribunal was precluded from considering the merits of her reconsideration application would be her " *(…) own unjustified delay in bringing the application*" (see para [11]), although she did consider the matter separately in relation to both the SRA proceedings (para [12]) and the High Court proceedings (paras [13] and [14]). She found that allowing the application out of time would "*(…) significantly prejudice the Respondent*" (see para [15] and [16]).

18. Taking all these matters into account EJ Cox decided it would not be fair and just to allow the application to be made six years out of time and refused the extension of time and accordingly the substantive application for reconsideration.

The Appeal

19. I remind myself that this appeal against a case management decision not to extend time for making an application. Such an appeal can only succeed if this tribunal is persuaded that the

employment tribunal has made an error of law in its approach to the issue or reached a conclusion which was perverse; an error of law might include taking into account an irrelevant factor or ignoring a relevant factor or proceeding on a misapprehension as to material facts.

20. I can see no error of law in the basic approach adopted by EJ Cox and the main factors she took into account. Mr Buttler says, however, that she erred: (a) by failing actively to consider the substantial merits of the application for reconsideration and simply making an assumption that there was a "reasonable prospect" of the decision being revoked and retaken in the light of the new documents; (b) in her consideration of the prejudice to the claimant by failing to recognise the significance of the 2014 judgment to the SRA and High Court proceedings; and (c) in her consideration of the prejudice to the respondent by failing to take into account that the basis of the application to reconsider arose from the respondent's failure to disclose the new documents before the hearing in March 2014 and by failing to take account of the fact that the respondent had kept the matter alive by bringing the High Court proceedings.

Prejudice to the Claimant

21. I deal with EJ Cox's consideration of prejudice to the claimant first. As I read the judgment, she appears to be saying that there would really be no prejudice of any substance to the claimant in refusing to extend time so that her application could be considered on its merits. That on the face of it is a surprising conclusion; but it can only give rise to a successful appeal it was based on a failure to take account of and/or a misapprehension as to relevant facts (as opposed to a disagreement as to the assessment of the weight to be given to the prejudice factor).

22. In para [13] and [14] of her judgment EJ Cox effectively rejected the case that the 2014 judgment would impede the claimant's ability to defend the High Court claim. She noted

(correctly) that the particulars of claim did not refer to the 2014 judgment and that there was nothing to suggest it would be relied on by way of issue estoppel, as Judge Richardson had been assured. However, it was plain that the respondent was still placing some reliance on the 2014 judgment in the context of the application to strike out the claim which had not at that stage been determined by DJ Goldberg, reliance which was continued in relation to the appeal brought by the respondent against DJ Goldberg's decision (see para 12 above). EJ Cox appears to have overlooked or (in relation to the appeal) could not have known about those matters, which on any view involved some prejudice to the claimant in dealing with the High Court litigation.

23. In para [12] EJ Cox rejected the claimant's case that unless the 2014 judgment was reconsidered the prospects of persuading the SRA to reconsider the rebuke would be minimised. I agree that that was really the only reasonable conclusion to be drawn from the history; further, the judge appears to have overlooked the outcome of the judicial review I refer to at para 8 above in reaching her decision. Also, though the point was not expressly argued, it seems to me that EJ Cox's comment at the end of para [12] "*In any event, the decision on whether to reconsider the decision to rebuke her is a matter for the SRA, not this Tribunal*" rather misses the point that the SRA's decision was bound to be influenced by relevant findings of the employment tribunal

24. Putting those points together it seems to me that it can properly be said that the judge made a material error of law in her assessment of the prejudice that would be caused to the claimant if she did not allow the application for reconsideration to proceed out of time.

25. Although not raised as a point of appeal, it also seems to me that some weight should have been given to the prejudice caused to the claimant by the mere continuing existence of the 2014 judgment representing, as it must, something of a stain on her character. Also, I cannot help noting that in paras [11] and [16] EJ Cox appears (as an alternative to her primary finding

on prejudice) to discount the effect of any prejudice there may be because it results from the claimant's unjustified delay in applying for a reconsideration. It seems to me that, if that is what she is saying, her approach is wrong and it serves as confirmation that she has not properly considered prejudice to the claimant: of course, the delay and the lack of good reason for it are absolutely central to the question whether time should be extended but the prejudice to the claimant of not extending time needs to be weighed properly in the balance and cannot be discounted beforehand because it is also caused by the claimant's delay.

The Other Grounds of Appeal

26. Given my conclusion on prejudice to the claimant, I do not need to consider the other grounds of appeal allowed to proceed by Judge Auerbach though they are plainly arguable. However, I do confess to a lack of enthusiasm for Mr Buttler's point that the judge was obliged in this case to carry out an independent assessment of the prospects of the reconsideration application before deciding whether to extend time and that it was not sufficient for her to assume that there was a "reasonable prospect" of the employment tribunal deciding to revoke the 2014 judgment and decide the issues again. I note that **Kwik Save Stores Ltd v Swain** [1997] ICR 49 was a case where an extension of time was sought for entering a notice of appearance (where an independent assessment of the merits of the proposed defence is clearly essential) and that in **Ezi Floor Trading LLP v Ul-Haq** (unreported, Wilkie J, 2.7.15), which did concern an application for reconsideration, the employment judge had not turned his mind at all to the basis for the application or, as far as I can see, the prejudice to the respective parties if time was or was not extended, concentrating entirely on the delay in making the application and the applicant's fault in relation thereto.

Disposal

27. For the reasons given in paras 21 to 25 above I am of the view that EJ Cox's decision involved

an error of law and I allow the appeal and set aside the decisions of 23 March 2020 and 27 October 2020.

28. It seems to me that the proper disposal having reached that view is that the matter should be remitted to EJ Cox to consider again the question of an extension of time and, if she is minded to extend time, whether there should be a reconsideration, what form that should take and whether the 2014 judgment should be set aside. Given the agreement the parties have reached she would not need to go any further than that. In considering whether to extend time I think it would be open to EJ Cox to consider matters in the light of all the circumstances as they currently stand (or, in any event, if necessary, it would be open for the claimant to apply again for a reconsideration on the basis of the current position).