

ENGLAND AND WALES / JUDGMENT

Stevenson v General Optical Council

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2015] EWHC 3099 (Admin) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION THE ADMINISTRATIVE COURT CO/5207/2014 Royal Courts of Justice Strand London WC2A 2LL Wednesday, 30 September 2015 B e f o r e: HIS HONOUR JUDGE DIGHT (Sitting as a Judge of the High Court)

- ----- Between: STEVENSON v GENERAL OPTICAL COUNCIL
- ----- Appellant Respondent Computer aided transcript of the stenograph notes of WordWave International Ltd trading as DTI 8th Floor, 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7404 1424 (Official Shorthand Writers to the Court)
- ----- The Claimant appeared in person Mr A Dos Santos (instructed by DWF Solicitors) appeared on behalf of the Respondent
- ----- J U D G M E N T HIS HONOUR JUDGE DIGHT: The issue that I have to determine in this appeal as a preliminary matter is whether the appeal was brought within time in accordance with the relevant provisions of the Opticians Act 1989 and, if not whether having regard to the European jurisprudence on the point, there are exceptional circumstances which could enable me to exercise my discretion in favour of the appellant to extend time. The appeal on the defendant's case is one day out of time. On the claimant's case he says it is in time. The background is this. The appellant, who appears in person, is an optometrist practising in Tenby, Wales. He was subject to proceedings before the General Optical Council's Fitness to Practise Committee in respect of various allegations, which resulted in the Committee initially making an order for conditional registration for a period of 15 months from 11 June 2012. A further period of conditional registration was imposed for a further 12 months on 4 October 2013. This appeal arises in respect of a second review hearing which took place in 2014 and in which the decision, which is the subject matter of the appeal, was handed down on 18 September 2014. In that decision, the Committee concluded that the appellant's fitness to practise remained impaired and extended the period of conditional registration for a further 12 months on varied conditions. By this appeal the appellant challenges that decision. The decision is appealable pursuant to Section 23 G(1) of the Opticians Act 1989, as amended by the amendment order of 2005. Sub-section 3, provides that: "A person in respect of whom an appealable decision falling within sub-section 1 has been taken may within the period of 28 days beginning with the day on which the decision was served on him appeal against the decision to the relevant court." The appellant accepts that a copy of the decision was handed to him on 18 September

2014. It seems to me, having regard to Section 23A(1)(a) that service took place in accordance with those provisions on 18 September by the decision being delivered personally to the appellant. The evidence appears to show, and I will come to the facts in due course, that the hearing at which the decision was handed down concluded at 3.30 in the afternoon of 18 September 2014. A Royal Mail Track and Trace receipt shows that the appellant's notice was received by the Royal Courts of Justice post room at 8.42 in the morning of 16 October 2014. The first point in this preliminary determination is whether, as the defendant submits, the notice of appeal was approximately 8 and 3/4 hours out of time. The claimant submits that there were still approximately 7 or so hours yet to run until the afternoon when the period calculated by reference to the number of hours involved expired. The factual background is that the decision was personally served on 18 September. The appellant wrote to the court by a letter dated 13 October 2014, purporting to enclose his notice of appeal and paying the fee of £240. What he subsequently says is that the the appellant's notice was in fact posted on 14 October 2014. He says in a letter of 4 December 2014 to the court manager of the Administrative Court's office as follows: "The appellant's Notice 161 was posted on 14 October 2014 by Guaranteed Next Day Delivery, delivery code AD 795 301 489 GB. The Royal Mail tracker traced that course, stated that the item applicable to that code could not be delivered on 15 October 2014, and no safe place option was specified by the addressee." The claimant asserts that there was a strike in the court at that date such that the post could not be received and goes on in the letter, to say: "I contacted the Royal Courts of Justice by telephone [and gives the telephone number] and spoke to a lady, I did not ask her name, who asked me for the postage reference number. I gave the lady the postage reference number and she informed me that she had no such record and there had been nothing scanned from the registry. She informed me that she would transfer me, to ask at the post room. My call was transferred back to the call menu by pressing '9' as directed. I was answered by an operator who transferred me to the post room. A gentlemen answered the call. He said he could not give me much help as he was only helping out as there was a strike on, he did not specify where, and there was a shortage of staff. "I gave him my name and reference number of the postage as I wanted it back but I queried the Royal Court of Justice's records. He took the details of my name and reference number. I then asked him for his name and he replied that his name was David. I asked him for his surname and realised that it was (inaudible) I then asked him if his Christian name was David, and learned his name was David." What then happened was that the appellant's notice was wrongly directed to the Court of Appeal Office, who date stamped it as having been received on the following day, 17 October 2014, and allocated a number for it, before it was redirected to the Administrative Court office on 7 November 2014, where it was allocated an Administrative Court Crown office number on that date and date-stamped "received" on 11 November 2014. The claimant served a copy of the notice on the defendant on 10 December 2014. SMITH BERNAL WORDWAVE By the acknowledgment of service and the skeleton argument relied on in opposition to the appeal, the respondent took the point in paragraph 2 that the appellant's notice was out of time and asserted in paragraph 2(b) that the time for appealing expired on 15 October 2014. That point was further explained in paragraphs 21

and 23 of the skeleton argument, which although stating that the date of expiry for appealing was 15 October, and that the notice was date stamped 17 October, asserted that the notice had in fact been filed on 7 November. Nevertheless, the point that time had expired on 15 October, and that the earliest evidence of receipt of it within the court building was 17 October, was made in that skeleton. The evidence before me suggests that the notice was received in the court building on 16 October. The first question that therefore arises is when the period for bringing the appeal expired. That depends on the proper construction of section 23(G)3, and the words: "Within the period of 28 days beginning on the day on which the decision was served on you." The defendant contends that the proper construction of that provision is that the time began to run on the day on which the decision was served and that the day of service is to be counted as the first of the 28 day with the consequence that time expired at midnight on 15 October, whereas the claimant contends that time runs from the next day and that time therefore expired on the twenty-eighth day after the decision was handed down. The question exercised me but it is apparent that it is dealt with by authority as appears from the note in the White Book in relation to rule 2.8 under the heading "Time," where in the notes at paragraph 2.8.1 the learned editors say: "When a step has to be taken within a period described at the beginning with a specified date then that day is included in the period but if the period is described as running from or after the specified day then that day is not included in the hearing." They cite in support of that proposition the decision of the Court of Appeal in *Zoan v Rouamba* [2000] 1 WLR 1509 which I have had the opportunity of looking at. In that case (which arose in relation to a claim relating to the Consumer Credit Act 1974) the Court of Appeal was asked to decide whether a judge had been right at first instance in calculating the expiry of a time limit. The facts are not material to this discussion but in paragraphs 23 and 24 of the decision, Chadwick LJ, giving the judgment of the court held as follows: "(23) Where, under some legislative provision, an act is required to be done within a fixed period of time "beginning with" or "from" a specified day it is a question of construction whether the specified day itself is to be included in, or excluded from, that period. Where the period within which SMITH BERNAL WORDWAVE the act is to be done is expressed to be a number of days, months or years from or after a specified day, the courts have held, consistently since *Young v Higgon* (1840) 6 M&W 49, that the specified day is excluded from the period; that is to say, that the period commences on the day after the specified day. Examples of such an "exclusive" construction are found in *The Goldsmith's Company v The West Metropolitan Railway Company* [1904] 1 KB 1 ("the powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act") and in *re Lymppe Investments Ltd* [1972] 1 WLR 523 ("the company has for three weeks thereafter neglected to pay"). In *Stewart v Chapman* [1951] 2 KB 792 ("a person ... shall not be convicted unless ... within fourteen days of the commission of the offence a summons for the offence was served on him") Lord Goddard, Chief Justice, observed, at pages 78-9, that it was well established that "whatever the expression used" the day from which the period of time was to be reckoned was to be excluded.

24) Where, however, the period within which the act is to be done is expressed to be a period beginning with a specified day, then it has been held, with equal consistency over the past forty years or thereabouts, that the legislature (or the relevant rule making body, as the case may be) has shown a clear intention that the specified day must be included in the period. Examples of an "inclusive" construction are to be found in *Hare v Gocher* [1962] 2 QB 642 ("if within [the period of two months beginning with the commencement of this Act] the occupier of an existing site duly makes an application ... for a site licence") and in *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 QB 899 ("a writ [...] is valid [...] for 12 months beginning with the date of its issue"). As Lord Justice Salmon pointed out in *Trow v Ind Coope*, at page 923, the approach adopted in the *Goldsmith's Company* case and *Stewart v Chapman* can have no application in a case where the period is expressed to begin on the specified date. He observed, at page 924, that "I cannot ... accept that, if words are to have any meaning, 'beginning with the date of its issue' can be construed to mean the same as 'beginning with the day after the date of its issue'". That, in my judgment, is the answer to the basis on which the period of 28 days is to be calculated. I am therefore compelled to the conclusion that 18 September 2014 was to be included within the period of 28 days, with the consequence therefore that the appeal had to be made by midnight on 15 October 2014. The appeal was not received until the following morning and although that is only a period of 8 and 3/4 hours, it is *prima facie* fatal to the claimant's appeal. A second question therefore arises and that is whether there is discretion in the court to extend time. The courts have traditionally treated time limits for appeals from regulatory bodies where the relevant statute contains no provision for extending time as absolute but in recent jurisprudence, in the two cases to which I will turn in due course, the Court of Appeal has held that in similar statutory appeals relating to the Nursing SMITH BERNAL WORDWAVE and Midwifery Council the strict time limits have to be read down so as to comply with Article 6 of the European Convention on Human Rights. In *R (on the application of Adesina & Ors) v the Nursing and Midwifery Council*

[2013] EWCA Civ 818, the Court of Appeal considered the question whether, on similar wording to section 28(G)(3), the time limit in that case was an absolute one admitting no exceptions, or whether it may be tempered and if so, on what basis. Having considered the decision of the Supreme Court in *Pomiechowski v The District Court In Legnica Poland* [2012] EWHC 3161 (Admin) and, in particular, the judgment of Lord Mance at paragraphs 37 and 39, the Court of Appeal came to the conclusion that a discretion to extend did exist, notwithstanding the apparently strict timetable provided by the wording of the statute. In paragraph 14, Maurice Kay LJ held: "[...] The context, exclusion from a profession, is still one of great importance to an appellant. There is good reason for there to be time limits with a high degree of strictness. However, one only has to consider hypothetical cases to appreciate that, without some margin for discretion, circumstances may cause absolute time limits to impair "the very essence" of the right of appeal conferred by statute. Take, for example, a case in which a person, having received a decision removing him or her from the Register, immediately succumbs to serious illness and remains in intensive care;

or a case in which notice of the disciplinary decision has been sent by post but never arrives and time begins to run by reason of deemed service on the day after it was sent (Nursing and Midwifery Council (Fitness to Practice) Rules 2004, rule 34(4)). In such cases, the nurse or midwife in question might remain in blameless ignorance of the fact that time was running for the whole of the 28 day period. It seems to me that to take the absolute approach in such circumstances would be to allow the time limit to impair the very essence of the statutory right of appeal. (15.) The real difficulty is where to draw the line. Mr Pascall, on behalf of the appellants, does not contend for a general discretion to extend time. Parliament is used to providing such discretions, often circumscribed by conditions (see, for example Employment Rights Act 1996, section 111(2), in relation to unfair dismissal). The omission to do so on this occasion was no doubt deliberate. If Article 6 and section 3 of the Human Rights Act require Article 29(10) of the Order to be read down, it must be to the minimum extent necessary to secure ECHR compliance. In my judgment, this requires adoption of the same approach as that of Lord Mance in *Pomiechowski*. A discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously" (paragraph 39). I do not believe that the discretion would arise save in a very small number of cases. Courts are experienced in exercising discretion on a basis of exceptionality. See, for *SMITH BERNAL WORDWAVE* example, the strictness with which the discretion is approached in relation to the 42 day time limit and the discretion to extend in connection with appeals from Employment Tribunals to the Employment Appeal Tribunal: *United Arab Emirates v Abdelghafar* [1995] ICR 65; *Jurkowska v HLMAD Ltd* [2008] EWCA Civ 231." In the cases before the Court of Appeal they held that there were no exceptional circumstances. In paragraph 17, referring to the facts of one of the cases before them *Maurice Kay LJ* said: "The case of *Ms Baines* is more of a paradigm case. She was present when the adverse decision was announced on 14 February 2012. The decision letter was posted by first-class post on 17 February, a Friday. Time therefore began to run on 18 February. She actually received the letter on 20 February. Her notice of appeal was lodged on 19 March, two days out of time. Although that may be described as marginal, it is unexceptional and there was no good reason why it could not have been lodged in time. There is no evidence of any exceptional difficulties encountered by her or her advisers. We were simply told by Mr Pascall that it had taken some time for her to find a specialist solicitor and to obtain legal aid. In these circumstances, I am not disposed to remit her case to the Administrative Court for further consideration as Mr Pascall requests. She gains no assistance from the *Pomiechowski* approach. The strict time limit defeats her." Similarly, in the case of the *Nursing and Midwifery Council v Daniels* [2015] EWCA Civ 225, where *Nicola Davies J* had permitted an appeal to proceed, notwithstanding that it was a few days out of time, on the grounds that the appellant had had understandable difficulty in obtaining the funds to pay the relevant fee, which the learned judge held to be exceptional circumstances enabling her to extend time. As the Court of Appeal records in paragraph 23 of the judgment, the central issue between the parties was the nature of the circumstances which will entitle the court to over-ride the statutory time limit of 28 days. *Jackson LJ* considered the various

authorities relevant to the existence and exercise of the discretion including the case of Adesina(supra). He noted in paragraph 34 that the following features stood out as significant: "I) DD did not contact the lawyers who had been acting for her until the last day before time for appealing expired. II) Upon being contacted counsel immediately drafted grounds of appeal, without any assurance that funds would be available to pay her. III) Within four days of being contacted (two of which were a weekend) the solicitors filed the appellant's notice. IV) DD has served no evidence. She has therefore provided no SMITH BERNAL WORDWAVE explanation as to how and from whom she raised £235 to pay the court fee. Nor does she reveal when she first took steps to raise that money. V) During February and March 2014 no-one gave any consideration to the question whether DD was entitled to remission of the court fee. On the material before us it appears that DD was so entitled.

35. On the basis of counsel's submissions and without the assistance of any evidence the judge made a finding that DD was unable to raise the court fee of £235 before 8th March 2014. I have read the transcript of the hearing below. There was no material before the court on which the judge was entitled to make that finding. The obvious inference from the known facts is that DD did not take any steps towards appealing until the very end of the 28 day period." His Lordship concluded, therefore, that there was no proper basis for the judge's findings of fact. But he said in paragraph 39 of his judgment, the Court's view was that the facts relied on in paragraphs 10-11 of Nicola Davies J's judgment did not in any event constitute exceptional circumstances of the sort described by Maurice Kay LJ in Adesina(supra) in the passage that I have already mentioned. The essence of the Court's conclusion was that the circumstances must be such that enforcing a 28 day time limit would impair the very essence of the statutory right of appeal before they could be characterised as exceptional. For those reasons the Court of Appeal allowed the appeal of the Council and overturned the decision of the judge at first instance. The next question that arises is whether that jurisprudence applies in respect of the different statutory regime which applies in the case before me; and secondly, if so, whether such exceptional circumstances exist in this case. Mr Dos Santos, on behalf of the defendant, accepts (having regard to the fact that this statutory regime for the regulation of a profession is similar to others which have been considered by the rules as being of one similar type) attracts the jurisprudence that I have just mentioned. He concedes that the principles which can be derived from the two cases that I have cited apply equally to the section 28(G(3)) time limit and therefore, the question for me is whether in the circumstances, the appellant can show exceptionally that the time limit should be extended. I am reminded of the need emphasised in the above cases for evidence supporting the exceptional circumstances. What the appellant says is, first, (although he does not put this at the forefront of his argument) that I should recognise that he is a litigant in person. Secondly, he says that he wanted to ensure that his appeal notice was as good a shape as it could possibly be before it was submitted. Thirdly, he says that he posted the document within good time and used a process which should have guaranteed that the document was received by the court within time SMITH

BERNAL WORDWAVE but that due to circumstances outside his control, it was not. He therefore did everything in his power to get the appeal in on time. The defendant submits that there is no evidence of a strike or difficulties in the court office at the relevant time. It submits that the claimant had plenty of time to prepare his appeal, and that if he wanted to produce evidence today to show the attempts that he had made to post the appellant's notice on time and lodge the appeal within the limit and demonstrate that he was frustrated by the strike (or other circumstances) he has had the opportunity of doing so but has not, in the circumstances, satisfied the evidential burden. I have come to the conclusion with some regret but nevertheless, it seems to me I am driven to it that there are no exceptional circumstances in this case of the sort of which the Court of Appeal considered in *Adesina*(supra) and *Daniels*(supra) where, what in what are truly exceptional circumstances, amounting to a denial of justice the court may be forced to accept that the strict time limit and the rules are to be read down so as to comply with the Article 6 rights of the appellants. This case does not begin to fall within the sort of factual exception considered by Kay LJ in the *Adesina*(supra) case. The fact that the system used by the claimant to ensure that the notice of appeal was received in time by the court office did not work was a risk taken by him. Moreover it involved an additional risk factor given the late stage at which the documents were posted by him. There was no margin of error allowed for something going wrong. The exceptional circumstances referred to by the Court of Appeal are not intended to cater for the type of risk which was taken by the claimant. I well understand why it is that the appellant wanted, as a litigant in person, to ensure that his notice of appeal was in as good a state as it could possibly be (setting forward his case in the best possible way) but that is not in my judgment a sufficient justification for leaving it until the very last day for posting the notice to the court. In those circumstances it is, as I say, with regret, that I find that this is not a case in which the court can properly exercise its discretion in favour of the appellant. On the preliminary issue I have come to the conclusion that the appeal is therefore out of time and must be dismissed. Yes. MR DOS SANTOS: My Lord, that leaves one issue and that is the issue of costs and I invite my Lord to award costs to be assessed if not agreed. HIS HONOUR JUDGE DIGHT: Yes, anything you want to say about that. THE CLAIMANT: I beg your pardon? HIS HONOUR JUDGE DIGHT: Is there anything you want to say about the application of costs. SMITH BERNAL WORDWAVE THE CLAIMANT: Urm -- HIS HONOUR JUDGE DIGHT: -- the ordinary principle is that the loser pays the costs unless there is some other good reason why the court should not take this course. THE CLAIMANT: The matter of costs will always affect a person's decision whether to appeal. If costs are going to be a detriment for someone to appeal, then costs must not necessarily be given to any party because of the matter of costs. I try my best to bring this appeal to the courts, the Royal Courts of Justice, in time. Exceptional circumstances may or may not have disrupted that. Whether a strike is an exceptional circumstance, flood, war, pestilence or whatever, there were circumstances outside my control which made the appeal in law late. In that case, I do not think costs should be agreed. HIS HONOUR JUDGE DIGHT: Thank you very much. Well, I understand Mr Stevenson's submission that the costs may affect a decision as to whether or not an appeal should be pursued in respect of this decision. It seems to me

that that is not actually a proper factor to take into account in deciding whether to depart from the ordinary principle that the costs should follow the event, namely that the loser should pay the winner's costs. It would in my judgment be wrong in exercising my decision to depart from that principle in this case. I am going to order the appellant, that is the claimant, to pay the defendant's costs to be subject to detailed assessment if not agreed. If you want to appeal my decision, I think I am right in saying Mr Dos Santos that because it is a second appeal I could not give permission anyway? MR DOS SANTOS: I believe that is right but if you could spare me for a moment, I could confirm that. HIS HONOUR JUDGE DIGHT: I mean, ordinarily if you wanted to appeal I would ask you to ask me for permission and I would consider it but I think because this is an appeal from the appeal itself, the rules said that I could not even consider giving you permission and that the only court that can consider that is the Court of Appeal. MR DOS SANTOS: R 52 13: "Permission to apply from the Court of Appeal. Any appeal to that court, the decision of the High Court which was itself made on appeal." HIS HONOUR JUDGE DIGHT: Yes. MR DOS SANTOS: So, essentially -- it is for the court -- HIS HONOUR JUDGE DIGHT: -- and it does not distinguish between statutory appeals on bodies such as the -- MR DOS SANTOS: -- no, it does not -- SMITH BERNAL WORDWAVE HIS HONOUR JUDGE DIGHT: -- General Medical Council or appeals from other courts. MR DOS SANTOS: No, it does not, it just states that when a High Court is the Court of Appeal in a matter -- that permission to apply from the Court of Appeal. HIS HONOUR JUDGE DIGHT: All right. So I cannot take it. If you want to appeal my decision you will have to ask the Court of Appeal for permission. MR DOS SANTOS: The time limit, I think it is 21 days. I think it is 21 days but I need to check that. Whether it is 21 days. I will just clarify that for you. HIS HONOUR JUDGE DIGHT: I think it is 21 days. MR DOS SANTOS: I will just have to clarify that for you. Yes. (Counsel talk amongst themselves) HIS HONOUR JUDGE DIGHT: Thank you very much indeed. MR DOS SANTOS: Yes, I am grateful to those instructing me. At 52.4(1): "Where the appellant seeks permission from the Appeal Court requesting the appellant's notice, the appellant's file the appellant's notice at the Appeal Court within. The court makes a direction ...[Reading to the Words]... 21 days after the date of the decision of the Lower Court about how it wishes to appeal." HIS HONOUR JUDGE DIGHT: It is 21 days after, so we are now an earlier discussion, that is 21 days beginning tomorrow. MR DOS SANTOS: Beginning tomorrow. THE CLAIMANT: As matters in this case have reduced my income, not the case itself but my bills which have arisen from the case from different parties within the case, has restricted my income for the last 2 years will that have any bearing on my assistance (or whatever) to the court for the payment for the defendant's costs? HIS HONOUR JUDGE DIGHT: The costs. That is a matter that if -- the court has powers -- once the costs have been either agreed, or if not agreed assessed by an officer of the court, the court has power as I understand it, I cannot give legal advice, to allow you to pay by instalments -- I think that is right, is it not? MR DOS SANTOS: Yes. HIS HONOUR JUDGE DIGHT: But those are powers that I do not deal with but will be dealt with by somebody else. THE CLAIMANT: So, I will be receiving costs and it will be broken down to whatever, I will be receiving a demand for costs? SMITH BERNAL WORDWAVE HIS HONOUR JUDGE DIGHT: What you will initially get is some form of document or statement from the defendant's

solicitors explaining how much they want you to pay. It is up to you whether you agree to pay that amount. If you choose to challenge it they can be assessed by the courts but there is a process that then has to be gone through, you have to pay a fee. That is dealt with by what is called the Senior Court Costs' Office, which is another building on the complex. It is another process. I have no idea how much is involved but the costs officers, they are called 'Costs Masters', would set the amount that has to be paid if you cannot agree between you. THE CLAIMANT: Will the fact that I did not receive papers from counsel, or parties concerned with counsel, will that be a legitimate argument? HIS HONOUR JUDGE DIGHT: I cannot advise you. The Costs Office, the Costs Master, is entitled to take account of conduct. Whether what you rely on amounts to sufficient conduct, I do not know. All right, thank you both very much. SMITH BERNAL WORDWAVE

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewhc/admin/2015/3099>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/stevenson-v-general-optical-council-2015>

Prepared on 23 October 2026 · Esheria