Appeal No. UKEAT/0228/15/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 August 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

BRITISH SECURITY INDUSTRY ASSOCIATION — APPELLANT

MS R BROWN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL BARNETT (of Counsel) Instructed by: Beers LLP North Quay House Sutton Harbour Plymouth PL4 0RA
For the Respondent	Written submissions

SUMMARY

PRACTICE AND PROCEDURE - Postponement or stay

The Employment Judge was required to give Reasons "proportionate to the significance of the issue" which "for decisions other than judgments may be very short". The Respondent applied for an adjournment making two good points: (1) the Employment Tribunal had asked for dates to avoid; they had been given; the case had been listed in accordance with them; but it had then been adjourned at the Claimant's request to a date beyond those for which availability had been requested; (2) the key witness, the Respondent's Chief Executive, had an important conference in Malaysia long booked for the re-listed dates. These were good points; the Employment Judge was not bound to accede to them but he was required succinctly to address them. His Reasons did not show that he had considered them at all or why he rejected them.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by the British Security Industry Association ("the Respondent") against a decision of Employment Judge Gaskell dated 25 August 2015, refusing a renewed application by the Respondent to postpone a hearing listed for 1 and 2 September 2015. This is Tuesday and Wednesday of next week, Monday being a Bank Holiday.

2. Ms Rhian Brown ("the Claimant") began proceedings earlier this year claiming compensation for unfair dismissal. The Respondent has defended those proceedings. There has been an unfortunate listing history. I can take it from a statement by Mr Housego, the Respondent's solicitor:

> **"2. This unfair dismissal tribunal hearing was initially listed for one day on 28 May 2015. The Respondent intended to call two witnesses, the dismissing officer and the appeal officer. The hearing notice was sent to the parties on 10 March 2015 without consultation over dates. We immediately informed the tribunal that neither of our witnesses were available, and sought a postponement.**
>
> **3. We were asked to supply dates to avoid until August 2015, which we did.**
>
> **4. On 28 May 2015, the hearing was relisted for 16 and 17 July 2015.**
>
> **5. On 16 June, the tribunal granted an application by the Claimant that the hearing on 16 and 17 July be postponed. We were not sent that application, and have still not seen it, despite asking the tribunal twice for a copy.**
>
> **6. On that same date, 16 June 2015, the tribunal relisted the hearing for 01 and 02 September without consultation with the parties over available dates. This date was outside the window for which available dates had previously been requested.**
>
> **7. We wrote a number of letters to the tribunal requesting a further postponement and explaining why our two witnesses could not attend. Prior to the final order under appeal (25 August 2015), we supplied two witness statements from James Kelly, the dismissing officer, and supporting documentation showing that he was committed to his trip to Kuala Lumpur, and it was a date to which he was committed over a year previously, in around June 2014."**

3. I have seen key pieces of correspondence. The Respondent's solicitors had explained to the Employment Tribunal in April 2015 particular difficulties with one of its witnesses. That is no doubt why the Employment Tribunal very sensibly asked for dates to avoid. The Respondent's witnesses are senior members of management. The case was listed in accordance

with dates given by the Respondent. The listing was then vacated. The Respondent was not told why. The new date given did not take account of dates to avoid. The Respondent promptly provided dates of availability for September. Employment Judge Gaskell, on 13 July, gave an explanation, which, with respect, entirely missed the point that the case had been listed without dates of availability being taken into account. The Respondent made the point again, reiterating its witness difficulties. Subsequent decisions did not, to my mind, really do justice to the correspondence. The only criticism that can be made of the Respondent is that it could have given a more detailed explanation of its witness difficulties.

4. Eventually, however, it gave the most detailed explanation that could reasonably be required of its witness difficulties in a statement by Mr Kelly, dated 20 August, together with a further statement dated 22 August, replying to comments made by the Claimant's representative. Put shortly, Mr Kelly is the Chief Executive of the Respondent; the conference which he wished to attend was a longstanding conference on 1 and 2 September in Malaysia; the Respondent is a sponsor of the conference and he, of course, is the Chief Executive of the Respondent. He said that the event, and the meetings he would attend while he was there, would be worth many thousands of pounds in business to the company. He made it clear that it had been a booking in his diary for this year for some time.

5. The only response by Employment Judge Gaskell was to say:

> **"1. The respondent's application to postpone has been considered by 3 different Employment Judges and is refused for the reasons repeatedly given. The case remains listed for 1st and [2nd] September 2015.**

6. For the purposes of this appeal, which has been listed at very short notice, I have a Notice of Appeal and the briefest of skeleton arguments drafted by Mr Barnett on the Respondent's behalf. I have written submissions from the Claimant's representative, sent in by

email at 10.29 this morning. I should mention that I also have an email and letter by the Regional Employment Judge dated this morning. I did not invite submissions from the Regional Employment Judge but since she makes points which might be thought to be points in favour of the Claimant, I have taken her letter into account as a matter of elementary fairness to the Claimant.

7. The decision of Employment Judge Gaskell was a case management decision. Wide latitude is given to Employment Judges in matters of case management. They can seldom be said to give rise to a question of law. Nevertheless there are boundaries. The decision must be taken in accordance with legal principle; factors which it is essential to take into account must not be left out of account; factors which are wholly irrelevant must be left out of account, and the decision must be within the parameters of reasonableness. That is to say it must not be perverse.

8. Moreover, reasons must be given for it. Rule 62(4) of the **Employment Tribunals Rule of Procedure** say that:

> **"(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short."**

9. The Employment Judge gave only the very briefest of reasons for his decision. They did not need to be lengthy. But the reasons did need to grapple even if only in a sentence or two with the two key points which were made on the Respondent's behalf. Firstly, the Chief Executive was booked to attend at a conference in Malaysia, which, on the evidence, was of real importance to the Respondent company. Secondly, the date had been listed despite the fact that the Employment Tribunal had not obtained dates to avoid for the period in question, having previously sought dates for an earlier period. That the case was adjourned from July was no

fault of the Respondent at all. It was reasonable to expect that its commitment would be taken into account in relisting the case.

10. In my judgment, the reasons simply do not grapple with the question whether an adjournment should have been granted. It was not necessary for the reasons to be substantial; it was necessary for them to explain why it accorded with the overriding objective to press ahead with a two-day case at a time when the dismissing officer was booked to be elsewhere on a matter of real importance to the Respondent company. The Employment Judge did not do so. It follows that the appeal must be allowed.

11. In ordinary circumstances I would return the case to the Employment Tribunal to take the decision again. That is simply impractical in this case. There is no time for the decision sensibly to be taken again. Nor - in the light of the fact that the Regional Employment Judge has written a letter effectively expressing a view on one side - do I know to whom I would remit it to be heard at very short notice. It seems to me that the only just course to take is for the appeal to be allowed, for Employment Judge Gaskell's decision to be set aside and for the postponement to be granted. I, therefore, order that the hearing on 1 and 2 September be postponed and that it be relisted after the Employment Tribunal has given an opportunity to the parties to give dates of availability. I make it clear that dates of availability may not be the only matter that the Employment Tribunal will take into account, but it should certainly have reasonable regard to them before it lists the case.

12. I return to the letter of the Regional Employment Judge because, as I have said, there are points in it which might appear to be points on behalf of the Claimant. The first point made in both paragraphs 1 and 6 of the letter, was that there had been no application to Employment

Judge Goodier or to any of the other Employment Judges formally to reconsider their decisions. The decisions were, however, case management decisions. There can only be a formal application to reconsider a Judgment. The appropriate course was to apply, as the Respondent in effect did, under Rule 29 to vary the case management order.

13. The Regional Employment Judge also pointed out that attendance at the conference was a matter of choice. In one sense all business commitments are matters of choice, although in this case it is right to say that the choice was made before the Employment Tribunal changed the hearing date without reference to the Respondent. The task of the Employment Tribunal was not to decide whether the commitment is a matter of choice; it was to apply the overriding objective and to decide whether it would be just to grant the adjournment.

14. The Regional Employment Judge also pointed out that the Respondent's evidence "critically … confirmed that no travel arrangements had yet been made". I do not for a moment see why this factor is critical. Whether arrangements are made at short notice or long notice often has to do with the agency that the business uses. The key point was that unless the witness statements were rejected the conference was an important one which the Respondent had chosen to attend by its Chief Executive for good reason prior to the Employment Tribunal's listing.

15. The Regional Employment Judge also said that Employment Judge Gaskell considered that attending before a Tribunal should take priority especially in view of the Claimant's objections to postponement. The Regional Employment Judge may be correct about this; but the Employment Judge did not explain why, especially given that the case had been taken out of

the list at the Claimant's request and listed without reference to the Respondent for dates which were not convenient for it.

16. I have also looked at the Claimant's representative's letter. This does not answer the key question of the sufficiency of the Employment Tribunal's Reasons. I should say that I am told by Mr Barnett that it is true that Mr Kelly was informed about the reason for adjournment on 5 July, that was, of course, some weeks after the adjournment had been granted.

17. Now, there will be a transcript of this Judgment and the order, as I have said, is: firstly, that the hearing on 1 and 2 September is postponed; secondly, that it is to be relisted after the Employment Tribunal has given the parties an opportunity to give dates of availability.