Appeal No. UKEAT/0135/15/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 August 2015

Before

MR RECORDER LUBA QC

(SITTING ALONE)

MISS A L BOOTHE — APPELLANT

THE GOVERNING BODY OF TOYNBEE SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR LACHLAN WILSON (of Counsel) Instructed by: DLG Legal Services PO Box 2068 AMP House 7th Floor, North Wing Dingwall Road Croydon Surrey CR90 9NE
For the Respondent	MR SPENCER KEEN (of Counsel) Instructed by: Hampshire County Council Legal Services Room 22 - EII Court South The Castle Winchester Hampshire SO23 8UJ

SUMMARY

PRACTICE AND PROCEDURE - New evidence on appeal

PRACTICE AND PROCEDURE - Postponement or stay

PRACTICE AND PROCEDURE - Striking-out/dismissal

Teacher dismissed on capability grounds. Claims of unfair dismissal and disability discrimination struck out because: (1) failure to comply with case management directions; and (2) fair trial impossible.

On appeal:

(1) *Fresh Evidence.* Application to adduce fresh medical evidence on the appeal refused because: (a) application had been made to the Tribunal for reconsideration [to introduce it], that application had been refused and there had been no appeal; (b) the EAT **Practice Direction** had not been complied with; (c) the evidence could have been obtained earlier with reasonable diligence; and (d) earlier medical evidence had been impugned on the basis of its veracity and similar points might have been taken [had the opportunity been provided] on the new evidence.

(2) *Postponement.* The Tribunal had sufficiently dealt with an application to postpone the hearing before them. They had reviewed the long history of applications to postpone made earlier and in respect of earlier hearings. Their decision to proceed rather than postpone was not made in error of law.

(3) *Striking out.* The Tribunal had been entitled to find that the Claimant had failed to comply with case management orders without just cause and that her conduct of the litigation had made the fair determination of the claims impracticable.

MR RECORDER LUBA QC

Introduction

1. This is a Claimant's appeal from the striking-out by an Employment Tribunal of claims that the Claimant had made to the Employment Tribunals Service.

Background

2. Miss Boothe was a teacher of English at Toynbee School. Her employment began in September 1992 but ended with her dismissal in August 2013. The reason given by the school for the dismissal was "capacity"; that is to say, Miss Boothe's continuing ill-health was preventing her from fulfilling her teaching responsibilities.

3. In November 2013, Miss Boothe brought a claim to the Employment Tribunals Service asserting that her dismissal had been unfair and that she had been the victim of discrimination on grounds of disability. The claim form also raised claims of victimisation, harassment, personal injury and loss of pay. The claims were resisted by the school.

4. Following a Preliminary Hearing on 26 August 2014, conducted by Employment Judge Coles, procedural orders for the management and disposal of the claim were promulgated on 3 September 2014. The directions given by the Employment Judge were designed to drive the claim forward and to enable it to be heard by an Employment Tribunal over three consecutive days starting on Monday 24 November 2014.

5. Miss Boothe did not comply with all aspects of the procedural timetable set out in the case management directions; most particularly, she failed to provide - in accordance with the

timetable - a witness statement, a medical report and an impact statement of the effect upon her of her disabilities. Instead, she applied for extensions of time in respect of those deadlines and for a postponement of the scheduled November 2014 hearing. Her applications were unsuccessful. She was directed to renew any application to postpone the hearing with the Tribunal assigned to hear the claim; she did so. Meanwhile, the school had applied on 30 October 2014 for an order that the claim be struck out because, among other matters, Miss Boothe had not complied with the Employment Tribunal's case management orders. The applications of both parties were listed for consideration at the outset of the scheduled hearing of the claim on 24 November 2014.

The Hearing on 24 November 2014

6. The case was listed on 24 November 2014 for hearing before Employment Judge Coles, sitting with Mrs Foulser and Ms Robertson. Miss Boothe did not attend, and she was not represented. She supplied written submissions dated 24 November 2014, which were transmitted to the Tribunals Service about an hour before the hearing was due to commence and which were placed before the Employment Tribunal. Miss Boothe also arranged for two ring-binders of documents to be delivered on the morning of 24 November, and they were brought before the Tribunal in the course of its hearing. The school attended by its representatives and witnesses and had the services of Mr Keen of counsel.

7. Having seen Miss Boothe's written submissions and having heard argument from Mr Keen for the school, the Employment Tribunal acceded to the school's application and struck out the claim. It did so for two alternative reasons, either of which is, on its own, sufficient in law to sustain a striking-out. The first reason was the failure to comply with the orders of the Tribunal; that is to say, the case management directions made in August 2014. The second

reason was that the Employment Tribunal considered that a fair trial of the claim was no longer possible.

8. It is from that strike-out order, which was explained in Written Reasons promulgated to the parties on 9 December 2014, that Miss Boothe now appeals. On the appeal the school is again represented by Mr Keen, who appeared below, and Miss Boothe is represented by Mr Wilson of counsel. Both counsel submitted very helpful skeleton arguments and developed those in the course of oral submissions before me.

Application to Adduce Fresh Evidence

9. In the course of his oral submissions when opening the appeal, Mr Wilson indicated that he might make an application to adduce fresh evidence before this Appeal Tribunal. However, before developing the application he very properly disclosed that an application for reconsideration had been made in December 2014 to the Employment Tribunal itself, in the usual way, seeking to adduce the fresh evidence. Mr Wilson could not initially indicate what had occurred on that application. I granted a short adjournment for Mr Wilson to explore with Miss Boothe - who was not present at the hearing of her appeal - what had happened to that application and for Mr Wilson to take instructions from Miss Boothe as to whether she wished to proceed with a fresh-evidence application. After a short adjournment, the information reported to me was that (1) the Employment Tribunal had considered and determined the application for a reconsideration but had declined it and (2) that Mr Wilson's instructions were indeed to make an application to me to adduce fresh evidence.

10. The application by Mr Wilson was to adduce the documents that appear at pages 89 to 94 of my bundle. Page 89 contains an almost indecipherable photocopy of a letter from the GP

surgery attended by Miss Boothe and dated 13 October 2014. It is apparently the covering letter to a longer report dated 13 October 2014 signed on the fourth page by the GP, Dr Angela Mooney. The final page of the documentation sought to be introduced is a letter from Dr Mooney addressed "To whom it may concern" and dated 24 November 2014. Evidently, none of this documentation was before the Employment Tribunal, the last of them self-evidently not so because it was said to have been a document actually produced after the hearing had concluded on 24 November 2014.

11. Mr Wilson submitted that this documentation, notwithstanding that it had not been before the Employment Tribunal, could be introduced on the appeal because it met the principles set out in the well-known authority of **Ladd v Marshall** [1954] 1 WLR 1489; that is to say, that the evidence could not have been obtained with reasonable diligence for use at the Tribunal hearing, that it is relevant and would probably have had an important influence on the hearing, and that it was apparently credible evidence. Accordingly, Mr Wilson submitted that I should allow the application and take these documents into consideration in the disposal of this appeal.

12. With great respect to Mr Wilson, this was an application that was doomed from the outset. First, it faced insurmountable procedural difficulties. The correct treatment by this Appeal Tribunal of fresh evidence is indicated by section 10 of the **Practice Direction** (EAT Procedure) issued in 2013. The first paragraph in section 10 makes it plain that the proper way for parties to proceed when they seek to introduce fresh evidence is to apply to the Employment Tribunal itself for a reconsideration. That is to ensure that there is, at first instance, a decision on the introduction or otherwise of fresh evidence. From such a reconsideration decision a party then has a fresh right of appeal to this Employment Appeal Tribunal.

13. As I have already indicated, in this case that course was followed, reconsideration was sought and the application was unsuccessful. It seems that Miss Boothe has chosen not to appeal that decision. She now puts Mr Wilson in the difficult position of inviting me to introduce this very evidence on this appeal. As the terms of section 10 to the **Practice Direction** indicate, that is far from the usual expectation when there has been an unsuccessful application for reconsideration. But Mr Wilson's more difficult task was to overcome the requirements of section 10 of the **Practice Direction**, which indicate when and how an application to adduce fresh evidence should be made. In particular, it indicates that the application should be made at the same time that the Notice of Appeal is presented or as soon thereafter as may be.

14. In this case, the Notice of Appeal was submitted, apparently, in January of this year; we are now in August, and it is only on the hearing of the appeal that the application is being made. Moreover, paragraph 10.2 of the **Practice Direction** makes it plain that the application must be supported with evidence; there is no evidence in support of the application. Further, in this particular case the Respondent had, in the Respondent's Answer, put the Appellant on particular notice as long ago as 11 June 2015 that there had been no application to adduce fresh evidence and in those circumstances, unless application was successfully made, no fresh evidence could be relied upon in the appeal. Notwithstanding that indication, no application was made. The necessary consequence of the application being made by Mr Wilson, whilst on his feet, is that the Respondent has had no notice of it.

15. In those circumstances, Mr Keen began his submissions on the application for fresh evidence with a submission that it would be unfair for the application to be allowed to proceed given the want of compliance with the procedural requirements of the Tribunal, which have

been established for good reason. I accept that submission and agree with it. Even if that were not the case and it were possible to entertain the application to adduce fresh evidence on its merits, I have no hesitation in finding that it would fail.

16. I address myself to the three criteria in **Ladd**. First, could the evidence have been obtained with reasonable diligence for use at the Employment Tribunal hearing? The answer to that is that one simply does not know. There is not a scintilla of evidence from Miss Boothe herself as to why she did not earlier obtain the corpus of documents on which she intends to rely. It is suggested by Mr Wilson that at least one of those documents - the document generated on 24 November 2014 - could self-evidently have not been supplied or obtained earlier because the GP who had made it had recently been on holiday and had not returned from holiday until the date of the hearing itself, 24 November 2014. That may have gone some way to explaining whether such a document could have been obtained, but what one needed to know was when the doctor had gone on holiday and why an application to the doctor to prepare this letter had not been made at an earlier stage. As to that, there was silence.

17. Of course, Mr Wilson took me to the plethora of material that was available as to the very considerable difficulties that Miss Boothe has suffered in respect of her physical disability and the mental illness that she asserts she has suffered by reason of stress. None of that, however, was directed to demonstrating why the material produced before me on the application for fresh evidence could not have been obtained earlier and placed before the Tribunal.

18. As to the second limb of **Ladd** - whether the evidence was relevant and could have had an important influence on the hearing - I accept that in particular the content of the certificate

dated 24 November 2014 might well have been relevant and had an important influence. It is not necessary to say anything further about that aspect, but the third requirement of **Ladd** is that the documentation is apparently credible. On the face of it this is apparently credible material. It is headed in each case by reference to the general practitioner's practice address and is signed by her or emanates from an email purporting to be sent from her surgery. The difficulty is that that apparent credibility is undermined by a consideration of the history of this case. The school has been making it plain, and had been making it plain for some months before the hearing in November 2014, that it did not accept the veracity of the documents that were purporting to be sent from this particular GP's surgery in relation to Miss Boothe's case. It necessarily followed that had an application been made to adduce this evidence in the proper way the credibility of the documents would have been put in issue and the Respondent school might well have been expected to put in evidence or at least challenge the evidence put forward in support of the application by Miss Boothe herself.

19. So, in those circumstances, the first and third criteria in **Ladd** would not have been satisfied even if I had considered it appropriate to entertain the application to adduce fresh evidence on its merits. For all those reasons, the application to admit fresh evidence fails.

Postponement of the Hearing on 24 November 2014

20. In the light of the history of this litigation, the essential prior question before turning to the substance of the challenge to the order under appeal is whether the Employment Tribunal ought to have first entertained and determined an application made by Miss Boothe for the hearings of both the strike-out application and the full claim to be postponed. Indeed, on his consideration of this Notice of Appeal on the papers, HHJ Richardson identified the central point in this appeal as the question of whether the Employment Tribunal ought to have

considered the application for an adjournment and whether the Employment Tribunal had erred in law in not addressing it (or in addressing it and refusing it).

21. To understand that point, it is necessary to say something more as to the history of the various applications to adjourn or postpone that have been made in this case. The Preliminary Hearing that had taken place on 26 August 2014 had itself been preceded by two applications to postpone, which had been successful and had resulted in the Preliminary Hearing being put back twice. When it was re-fixed for 26 October 2014, there was a further application to postpone it. That application was refused. The consequence was that the Preliminary Hearing went ahead and Miss Boothe attended it. In his record of what occurred at the Preliminary Hearing, Employment Judge Coles had noted as follows (paragraph A7):

> **"A7. … I again emphasised to [Miss Boothe] that the respondent, and indeed the Tribunal, is entitled to expect that the case will, if the claimant does not withdraw her claim, proceed to a substantive hearing and that it will not be open to her to apply for a postponement of such hearing, simply on the basis of the same mental health problems that caused her to apply for postponements of the Preliminary Hearing."**

22. Nevertheless Miss Boothe did apply, as I have indicated, on 25 October 2014 to postpone the forthcoming hearing fixed for 24-26 November. She did so, not in reliance on the same mental health problems that had caused the applications to postpone the Preliminary Hearings, but rather relying on a physically disabling condition that had developed since September 2014. For the same reasons, her application invited an extension of the dates for compliance with the case management directions. Initially, applications made by Miss Boothe had asked for an additional week - a subsequent application had asked for a delay of three weeks - but by the end of October 2014 she was making it clear that she could not begin to see her case as one properly in order before January 2015 at the earliest and possibly February 2015. In her application made to the Tribunal by email on 25 October 2014 she wrote this:

> **"I would respectfully like to request a postponement of the forthcoming Tribunal Hearing and the associated deadlines until January, please. Despite being ill, I have worked so incredibly**

hard to adhere to the deadlines stipulated by the Court Orders and the Respondent that, the repetitive non-ergonomic activities involved in the necessary administrative tasks have severely aggravated my spinal disability, and the highly concentrated time scale has meant that I have not had sufficient time to manage the resultant accumulation of spinal inflammation and agonizing pain by integrating adequate treatment opportunities for the inflammation to subside; the combination of which has caused my total incapacitation. …

I would like to apologise to the Court for having both a severe spinal disability and a severe mental health disability which have totally incapacitated me since 22 September 2014, and consequently, I have been bed-ridden, immobilized, heavily medicated, unable to function and worse still, I have been physically obstructed from engaging in the exchange of documents process or writing reports in accordance with the Court Orders. My mother has travelled to care for me 24 hours a day. It has taken over a week for me just to compose this email in instalments while lying flat in bed. … Please note the medical certificates which confirm my current incapacity; please refer to the previous letters from my Doctor in support of a postponement."

23. I have there read only two paragraphs of what is an email comprising some three closely typed A4 pages. The medical certificates submitted in support of the application on 25 October showed that Miss Boothe had been certified as not fit to work from 23 September to 8 October 2014. On the latter date, she had been certified again as unfit to work for a further 28 days.

24. The application made on 25 October 2014 had been refused by an order of Employment Judge Kolanko on 10 November 2014; that order is not before me. Miss Boothe was unsurprisingly dissatisfied with Judge Kolanko's order and sought a review, but that application for review was unsuccessful. There matters stood until 21 November; that is to say, the last working day before the scheduled three day hearing. On 21 November, Miss Boothe made a further application by email for a postponement. She wrote as follows:

"… I would be very grateful if the forthcoming Tribunal Hearing could be postponed until February because I am unable to move. …

I would like to assure the Court that my total immobilization is temporary but will take until February to heal sufficiently for me to be able to move, sit upright, stand and walk. Please note the attached medical certificates which confirm my spinal inflammation, work-related stress and an incapacity to perform administrative tasks.

I have been bed-ridden, immobilized, in need of personal care and asleep most of the time having been prescribed a cocktail of strong pain-killing, anti-depressant and anti-inflammatory Medication since September."

25. That email extends to some five and a half pages of typescript and concludes by referring to a number of attachments. Indeed, the number or size of the attachments was such

that they could not all be transmitted with the email to which they were intended to be attached, and they were transmitted in chunks over the next following few hours, extending into the morning of Saturday 22 November 2014. The attachments indicated, at letter (d), "Please note the Medical Certificates which confirm my current immobilization", and at the very penultimate line:

> **"Should further information be required, please contact Julie Davies, Practice Manager of Abbeymead Surgery, Romsey."**

26. Attached to that email then were a number of documents, including photocopies of X-rays, an historic report from the access-to-work scheme and a number of fit-for-work certificates, the most recent of which appeared to have been issued on 19 November 2014 and declared an unfitness to work until 8 January 2015. From that medical certificate it can be seen that the position was that Miss Boothe had been able to access GP surgery services some two days earlier on 19 November. It is right to say that the most recent medical certificate not only certifies the period as being a period of incapacity starting on 19 November but indicates at its head that the GP "assessed your case" on 20 November 2014. The conditions described are ongoing spinal inflammation and pain and work-related stress. The comments given are that the patient is unable to complete administrative tasks or work reports. Those are rather surprising entries to find in respect of a medical certificate for a person who has not been in work since August of the previous year, but nevertheless that was the material provided to the Employment Tribunals Service.

27. It appears that on the same date, 21 November, the papers were placed before a Judge of the Employment Tribunal and Miss Boothe was notified that the application to postpone had been unsuccessful. She was read the same reasons that had been given in the decision issued by Employment Judge Kolanko some 11 days earlier on 10 November. Faced with that decision,

over the weekend of 22 and 23 November Miss Boothe prepared written submissions, which she transmitted by email to the Employment Tribunal on the morning of 24 November 2014. Those written submissions extend over some five or six closely typed pages and set out a huge variety of material related to the claims and the procedural difficulties in advancing them. At paragraph 2 on the first page Miss Boothe writes:

> **"2. I would respectfully like to make an application to the Court for an adjournment for the following reasons**
>
> **…"**

28. A large number of reasons are set out in a series of bullet points, which culminate with this:

> **"I requested a postponement on Friday because the Court could not accommodate the special needs for my disability, but this was denied, the reason being that the Medical certificates I submitted did not specify that I could not attend Court, though they did confirm that I was suffering from spinal inflammation and work-related stress, and that I was not able to work, perform administrative tasks or write reports. I had requested a more detailed report from Dr Mooney, but she was on holiday and would not be returning to work until today. I therefore request an adjournment in order to permit my G.P. to provide more detailed confirmation of my current incapacitation and the resultant special needs for my disability."**

29. In those circumstances, it could hardly have been clearer that Miss Boothe was again renewing an application, or perhaps making a fresh application, for an order that the Employment Tribunal's hearing on 24 November should not proceed. Did the Employment Tribunal consider this application, and if so, what were its reasons for rejecting it and proceeding with the hearing? Mr Keen, who was present for the school, makes the following assertion in his skeleton argument for this appeal at paragraph 32. He writes:

> **"32) The Tribunal considered whether to adjourn the case and/or to proceed in the Appellant's absence and took all the relevant factors into account. It is plain from its judgment that the Tribunal considered the following factors:**
>
> **a) the Appellant's non-compliance with the orders without just cause;**
>
> **b) the age of the case (which was becoming stale);**
>
> **c) the fact that, on the Appellant's case, it was unclear that the case would be effective even if an adjournment was granted;**
>
> **d) the Appellant's failure to provide relevant medical evidence;**

e) the undue expense and inconvenience that the Respondent would suffer if the Appellant was allowed to continue to litigate the case in the same manner;

f) the Appellant's correspondence and the changing nature of the Appellant's claims."

30. It is against the background of that assertion and of Miss Boothe's complaint that her application to postpone should have been allowed that one turns to the Written Reasons promulgated following the hearing of 24 November. The Written Reasons recount at paragraphs 5 to 9 the history of the applications earlier made to postpone the Preliminary Hearing, the warning that was given at that Preliminary Hearing about the likely reluctance of the Employment Tribunal to postpone the hearing of 24 November save in exceptional circumstances and the history of unsuccessful applications to postpone made in October and November 2014. It is right to say that they do not contain an express rejection of the application to postpone nor do they give any reasons to specifically explain that rejection. There is no express weighing on the one hand, and then on the other, of the respective merits and impacts of, alternatively, allowing or refusing the application to postpone.

31. Can it be said that the very fact that the Employment Tribunal proceeded on 24 November 2014 to consider the strike-out application is itself a clear indication that the application to postpone had been addressed and had failed? Mr Keen submitted that it was self-evident that the postponement application had been considered and refused and that the Employment Tribunal's Written Reasons did not need to spell that out. In his reply Mr Wilson did not demur from that submission. In my judgment, he was right not to do so. It seems to me self-evident that the Tribunal considered itself seized of an application to postpone, dealt with that application and refused it; that is why it then proceeded to deal with the strike-out application.

32. But can it be said that the Written Reasons evidence sufficient reasoning to sustain a conclusion that the right course was to refuse a postponement? To my mind, it is quite clear that the Employment Tribunal was seized of the whole procedural history of the case. After all, it was presided over by the same Employment Judge who had had conduct of the Preliminary Hearing. The Tribunal had before it, and had taken into account, the written submissions put in that morning by the Claimant repeating the postponement request, and it had had full argument in correspondence and submissions from the school as to why no further postponement should be granted. To my mind, the most telling indicator that the Employment Tribunal did entertain and fully determine the application is the final sentence of paragraph 9 of its Written Reasons, which reads as follows:

> **"9. … The claimant had supplied the Tribunal with copy doctor's certificates which indicated that she was unfit to attend work but there was no medical evidence provided to show that she was unable to attend a Tribunal hearing."**

33. That sentence, given the background and context, strongly indicates that the Employment Tribunal considered that the application to postpone did not get to first base as there was no medical evidence of any inability to attend the hearing. It is certainly the case that the Written Reasons could, and probably should, have more explicitly addressed the application to postpone and the reasons for refusing it, but I am satisfied that the Written Reasons do evidence the Employment Tribunal's active consideration and determination of the application.

34. If that is correct, and the contrary was not positively advanced by Mr Wilson, then the question becomes whether the decision to refuse the postponement application was made in error of law. Perhaps in the light of indication given by HHJ David Richardson, Mr Wilson's oral submissions in effect reformulated ground 1 of the grounds of appeal to take that point. By ground 1, Mr Wilson contended that the decision to proceed with the hearing, i.e. not to grant a postponement, was one that necessarily infringed Miss Boothe's right to a fair hearing of her

claims contrary to Article 6 of Schedule 1 to the **Human Rights Act 1998**. In particular, Mr Wilson submitted that if the mainstay of the reasoning of the Tribunal to refuse the application was the want of any medical evidence directed specifically to the question of whether she was fit to attend the hearing, Miss Boothe should have been given by the Tribunal a short adjournment until the GP's return from holiday so that she could then secure such medical evidence.

35. On that point, and on this ground, both parties took me to the helpful guidance given by the Court of Appeal in **Teinaz v London Borough of Wandsworth** [2002] IRLR 721. In that case the Court of Appeal upheld this Employment Appeal Tribunal in setting aside a decision of an Employment Tribunal that had refused an adjournment sought on medical grounds. In the course of its Judgment, the Court of Appeal gave valuable guidance as to the way in which applications to adjourn should be considered by Employment Tribunals, particularly where made on grounds of incapacity to attend the hearing. In particular, the guidance given in **Teinaz** suggests that there may be circumstances in which a short adjournment or postponement to seek more explicit medical advice might be appropriate.

36. In my judgment, that is not this case. Here, Miss Boothe had had ample opportunity to get her house in order and to augment her application for a postponement with medical evidence going directly to the question of whether or not she was fit to attend a hearing. On her own account, her bed-ridden condition had been prevailing for at least two months; i.e. from September to November 2014. She was plainly able to correspond during that period and could and should have got evidence addressing her fitness to attend a hearing. She had not only had a lengthy opportunity to provide such material but she had had a stark warning at the August Preliminary Hearing that only in exceptional circumstances would a postponement be allowed.

In my judgment, that was a warning that she did not sufficiently heed. Her tackle was not in order to support an application to successfully postpone the November hearing. If that was not apparent at the outset, it was certainly apparent from the sequential refusals of that application through October and November 2014.

37. However, Mr Wilson made the broader submission that even if, on the specific facts of this case, it could not be said that the Tribunal had not erred in putting the matter back for further medical evidence it had nevertheless reached a conclusion so unfair to the Claimant that it was one that ought not to have been adopted. As to the importance of a careful approach to applications to adjourn based on medical grounds, Mr Wilson reminded me of what had been said by Peter Gibson LJ in the **Teinaz** case at paragraphs 21 and 22.

38. It is right to say, as Mr Keen reminded me, that for her part Arden LJ had also made a contribution to the learning on adjournment applications in the course of that Judgment. She had indicated that adjournment applications fell to be determined within the broad discretion of Employment Tribunals and that their decision making was entitled to be accorded a degree of deference. In my judgment, the present case is a stark example of not only an Employment Tribunal carefully considering an application for a postponement in the context in which it was made but a case in which this Appeal Tribunal ought to accord a wide margin of deference to the particular case management decision whether to postpone the hearing or not. I cannot discern from the submissions of Mr Wilson, or from the ground of appeal as expressed in the Notice of Appeal, any proper basis for challenge to the Employment Tribunal's decision on this aspect.

39. The high-water mark of Miss Boothe's case appeared in paragraph 23 of her skeleton argument, provided by Mr Wilson, in these terms:

> **"In the present case the Claimant requested an adjournment until the following day so that her doctor, who returned from holiday on the first day of the case, could provide a diagnosis and prognosis. As a matter of basic fairness the Claimant was entitled to such a request. An order to strike out a claim is a Draconian measure … The Claimant is a disabled litigant-in-person. It is respectfully submitted that the Claimant was entitled, in the least, to an adjournment until the following day so that Dr Mooney's opinion could have been considered."**

40. That is as plain as a pikestaff an assertion that the exercise of discretion by the Tribunal to refuse a postponement was a perverse one. In my judgment, that does not get off the ground in the context of the present case given the factual scenario with which the Tribunal was faced on 24 November 2014. Ground 1 is framed in terms by reference to Article 6, the right to a fair trial, but, in my judgment, there is no infringement of that Article where a trial is provided for a party's claims but the party does not attend in circumstances where the Tribunal has considered and rejected, by a decision that cannot be impugned, an application to postpone.

The Order Appealed From

41. As already explained, the order appealed from is an order striking out the claim under the exercise of the Employment Tribunal's powers contained in Rule 37 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. The Tribunal put its decision on either of two alternative grounds: first, non-compliance by Miss Boothe with the procedural orders of the Employment Tribunal; and secondly, that it was no longer possible for the parties to have a fair trial.

42. Before turning to the challenge directed against both limbs of that order made in this appeal, it is necessary to say something about another ground on which the school had itself relied in its strike-out application; that is to say, the improper conduct of Miss Boothe in the

claim, particularly in relation to the deployment by her of certain medical material. That application was framed by reference to Rule 37(1)(b). The school's assertion was that the way in which certain medical information had come to be presented, as purporting to be a medical report from a general practitioner, had been scandalous, unreasonable or vexatious. Although the Employment Tribunal rehearses at paragraphs 12 to 14 of its Written Reasons the way the school's case was put on that ground, and indeed their concerns as to what was being suggested, they did not determine the strike-out application on that basis; they expressly declined to decide it under that sub-Rule (see paragraph 13 of the Written Reasons).

43. I turn then to the decision to strike out on the first of the grounds accepted by the Tribunal; non-compliance with the Tribunal's own earlier procedural orders. That power is given to the Employment Tribunal by Rule 37(1)(c). The Employment Tribunal give their reasons for allowing that application at paragraphs 14 to 16 of their Written Reasons. They say this:

> **"14. What the Tribunal was unanimously satisfied about, however, was that, notwithstanding the clear directions and indications given by Employment Judge Coles in the Order dated 26 August 2014, the claimant conspicuously failed, without just cause, to comply with the orders made in Schedule B to that Order.**
>
> **15. In particular, the claimant had failed to provide the written statement of impact of her alleged disability and, perhaps more importantly, to provide her written witness statement by 21 October 2014.**
>
> **16. The claimant has been perfectly capable of writing extensive letters and emails to the Tribunal and to the respondent and therefore there was no valid reason whatsoever why she should not be able to provide her written witness statement as ordered by the Tribunal."**

44. It is important to make one or two points about the language of those three paragraphs. Firstly, the Tribunal had put out of account the alleged failure to comply with the requirement to provide a medical report. That is no doubt because they had decided that the circumstances surrounding the presentation of the medical report should be left out of account, as I have already explained. They therefore focused on two deficiencies of the Claimant's own compliance with the procedural orders, the written statement as to impact and the witness

statement. In paragraph 14 they refer to such failure as having been "without just cause" and in paragraph 16 to there being "no valid reason whatsoever" for the non-compliance. It is right to say that not only was there non-compliance by the timetabled date of 21 October 2014 but there had been no compliance by the hearing date of 24 October 2014 in that there was neither an impact statement nor a witness statement available by that date.

45. Ground 2 of the grounds of appeal is that the Employment Tribunal went too far in holding itself satisfied that Miss Boothe had "no valid reason whatsoever" for non-compliance. Mr Wilson submitted that, in effect and in its context, this was a finding that Miss Boothe had had both physical and mental capacity to comply with the Employment Tribunal's orders when, on his submission, the available material spoke to the contrary. He complained, by the Notice of Appeal, his skeleton argument and then finally by his oral submissions, that the Tribunal here was guilty of the same error that Langstaff P and members of this Employment Appeal Tribunal had identified in **Pye v Queen Mary University of London** UKEAT/0374/11, decided on 23 February 2012. In that case, this Employment Appeal Tribunal decided that an Employment Tribunal had erred in law in taking upon itself the task of determining a matter of medical capacity rather than treating that as a matter for expert evidence.

46. Mr Keen, for the school, rejected this criticism of the Employment Tribunal. He relied on the reasoning set out at paragraphs 14 to 16 of the Written Reasons. He distinguished the judgment in **Pye** as a case in which the Tribunal had taken to itself the function of determining medical capacity when it was faced with a directly in-point medical report. In the instant case, Mr Keen submitted, the Tribunal was having to make a judgment for itself on a matter of fact. Had Miss Boothe failed, as they found, without just cause to comply with the Tribunal's directions, or had she had "just cause"? Her just cause, to put it shortly, was that she was

incapacitated and not able to produce two written documents: an impact assessment of the effect on her of her disabilities and a written witness statement. The Tribunal rejected that case not least because it was faced with a plethora of written material provided by the Claimant setting out, in its own course, the matters relating to the history of her claims, the nature of her claims and the nature of her disabilities. In those circumstances, Mr Keen submits that, as a matter of common sense, the Employment Tribunal was entitled to say that if she had the capacity to do those things she had had the capacity at the same time, and instead, to make a witness statement or an impact statement.

47. I accept and agree with that submission of Mr Keen. It seems to me plainly a matter on which the Tribunal was entitled to reach a conclusion based on the material that was before it. Mr Wilson contends that the nature, content and length of the written representations made by Miss Boothe were graphic demonstrations of her underlying difficulties in getting to grips with this litigation. I do not accept that proposition, and there was no medical evidence advanced by Miss Boothe to support it.

48. The rejection of this ground of appeal, as I do reject it, means that the strike-out order must stand, because the first of the bases upon which the claim was struck out has proved inviolate. But in case I am wrong, I go on to consider ground 3 of the grounds of appeal, which is an attack on the second limb of the strike-out order. Here, the Tribunal was relying on Rule 37(1)(e); that is to say, a case where "the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim". As to the application of that sub-Rule, the Employment Tribunal expressed itself trenchantly at paragraphs 17 to 18 of its Written Reasons. It said this:

> **"17. Furthermore, on the basis of the history of this matter hitherto and the content of the claimant's correspondence to the Tribunal, it was unanimously satisfied that the claimant would have been likely to seek to enlarge the scope of her contentions in relation to her claims and to continue to provide reasons for postponing the substantive hearing of this case.**

18. The respondent has already been put to considerable expense and inconvenience in dealing with the claimant's claims, particularly having regard to the manner in which they have been pursued and conducted. It is entitled to a fair hearing. The Tribunal was not satisfied, on the basis of the historic actions of the claimant and the content of her correspondence in relation to future likely conduct, that there will ever in reality be the possibility of this claim being the subject of a fair hearing."

49. As Mr Keen's submissions reminded me, the question of whether a case is or is not capable of a fair hearing is a question of fact that the sub-Rule casts upon the Employment Tribunal for determination.

50. On Miss Boothe's challenge to this aspect of the Tribunal's order it is not suggested that, in paragraphs 17 to 18, the Tribunal took into account any matter it was not entitled to take into account or that it left out of account some relevant matter. Rather, it is said that this was a perverse decision by the Employment Tribunal to strike out the entirety of her claims.

51. It is certainly correct that the Tribunal's reasons for applying the draconian sanction of strike out are pithily and succinctly expressed and that it is not a case in which there has been the usual exhaustive rehearsal of factors weighing for either side on the balancing scales of the question whether or not a fair trial could be achieved. Nevertheless, it is quite plain that by the time they had reached paragraphs 17 and 18 of their Written Reasons the Tribunal were fully seized of the history of the case and, more particularly, of the nature of the claims brought by the Claimant and made by her in her increasingly lengthy and, it must be said, repetitive letters and submissions to the Tribunals Service and the Respondent. They were quite clearly linking her past history of conduct of the litigation to prospective likely future conduct. They were linking, as they expressly mention, the history of repeated unsuccessful applications for postponement and the likelihood of such applications being made in the future. Those were, in my judgment, matters that they were entitled to take into account.

52. It is said by Mr Wilson, in his oral submissions, that the Tribunal erred in law by over-emphasising, or giving too much weight to, the question of the cost impact on the school of the continuing litigation. He reminded me of the decision in **Osonnaya v South West Essex Primary Care Trust** UKEAT/0629/11, a decision of Langstaff P sitting alone at this Employment Appeal Tribunal on 20 March 2012, in which the learned President had indicated the sorts of circumstances that should go into the balance. Mr Wilson submitted that this was a case of far too much weight being given to the financial inconvenience to the school and not enough to the injustice that might be suffered by Miss Boothe if her claims were struck out.

53. I accept Mr Keen's rejoinder to that submission. It seems to me that, in paragraph 18, the Tribunal are weighing a wider range of factors. True it is that they mention the considerable expense to which the school had already been put, but they also identify the inconvenience to the school in dealing with Miss Boothe's claims, their inconvenience in regard to the manner in which Miss Boothe has been pursuing and conducting the claim and the fact that the school itself is entitled to a fair hearing. It then goes on to put those matters in the context of the historic actions of Miss Boothe and her likely future conduct. That seems to me precisely the right way in which a Tribunal should address its task. It is not for me to say whether the ultimate conclusion is or is not one that I would have reached, but it is sufficient for me to say that I am not satisfied that this is a conclusion that no reasonable Tribunal could have reached.

Conclusion

54. For all those reasons, this appeal fails. I end my Judgment, however, by paying tribute to Mr Wilson, who has - in the absence of Miss Boothe - advanced every possible point that could properly have been advanced for her in somewhat challenging circumstances, and I commend him for his endeavours.