Appeal No. UKEAT/0615/11/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 November 2014
Judgment handed down on 13 July 2015

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MR G LEWIS

MISS M S SCHAATHUN — APPELLANT

EXECUTIVE & BUSINESS AVIATION SUPPORT LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS MARIA SCHAATHUN (The Appellant in Person)
For the Respondent	No appearance by or on behalf of the Respondent Written submissions from: Blake Morgan LLP Seacourt Tower West Way Oxford Oxfordshire OX2 0FB

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Employment Judge came to an impermissible conclusion on the facts in finding that the Claimant had asked the Tribunal to make a Norwegian interpreter available at the Full Hearing. Her email was plainly an enquiry if it would be possible for an interpreter to be present. Further, she was not responsible for the adjournment of the proceedings because the Tribunal could not provide an interpreter. The Claimant was not asked whether she would proceed without one or whether she was proposing to provide her own interpreter. Her enquiry did not cross the high threshold referred to in **Dr Osonnaya v Queen Mary University of London** UKEAT/0225/11.

THE HONOURABLE MRS JUSTICE SLADE

1. Miss Schaathun ("the Claimant") appeals from the Judgment of Employment Judge Lewis sent to the parties on 6 September 2011 ("the Costs Judgment"). The Employment Judge ordered the Claimant to pay the Respondent their costs in the sum of £2,500. The Claimant applied for a review of the Costs Judgment which was refused on 30 September 2011. By a Judgment sent to the parties on 5 August 2011 ("the Liability Judgment") Employment Judge Lewis sitting with members dismissed the Claimant's claim for 'automatic unfair dismissal' for making protected disclosures under **Employment Rights Act 1996** ("ERA") section 103A. The Employment Tribunal ("ET") upheld her claim for 'ordinary' unfair dismissal but made a **Polkey** (**Polkey v AE Dayton Services Ltd** [1988] ICR 142) reduction of 100% in the compensatory award. The Claimant appealed from the Liability Judgment which is the subject of a separate Judgment.

2. At the hearing of the appeal before us, Miss Schaathun represented herself. The Respondent's solicitors notified the Employment Appeal Tribunal that the Respondent would not be represented at the hearing of the appeal but relied on the skeleton argument dated 13 April 2012 prepared by their solicitors.

3. The costs order arose from the adjournment of the Full Hearing of the Claimant's claim which was listed to take place on 15 to 18 November 2010. The parties were notified of these dates on 20 May 2010. By email of 9 November 2010 Miss Schaathun asked that, "if possible," a Norwegian "translator" [interpreter] be present to assist her witnesses and her. The Claimant is Norwegian as were some of her witnesses.

4. On 9 November 2011 the Employment Tribunal wrote "A Norwegian interpreter will be arranged for the hearing." By email on Friday 12 November 2010 the Employment Tribunal Office notified the parties that "due to the unavailability of a Norwegian interpreter, Employment Judge Byrne directs that the hearing listed on 15 to 18 November 2010 is postponed." On the same day solicitors for the Respondent wrote to the ET:

> **"We were surprised not to be copied in on the Claimant's e-mail of 9 November 2010 until 14.25 today after we had been verbally notified that the Hearing had been postponed.**
>
> **We wish to object to the postponement of the hearing on a number of grounds which we have listed below:-**
>
> 1. **In or [our] view, the Claimant's e-mail is not applying for the Hearing to be postponed. She is seeking permission to be accompanied to the Hearing and also asks if it is possible for a Norwegian translator to be present. She does not expressly ask the Tribunal to provide a translator. To all intents and purposes she could have intended to bring her own translator to the Hearing. At the very least, we would submit that the Respondent should have been given the opportunity to provide a translator. It may be commercially cheaper for the Respondent to do this rather than incurring the costs of a postponed hearing."**

The solicitors asked for a reconsideration of the decision to adjourn. In their email of 12 November 2010 the Respondent also applied for an order that the Claimant pay their costs. However the ET emailed on 15 November 2010:

> **"The application to re-list the hearing has been considered by Employment Judge Byrne in the light of the suggestion that the claimant does not need a Norwegian interpreter. He notified the parties that the lists for Monday are now fixed and there is no Judge available. He directs that a case management discussion be listed with a time allocation of 2 hrs to consider the costs application and to fix a new Hearing date. Please see attached for Notice of Case Management Discussion."**

5. On 10 January 2011 Employment Judge Cowling directed that the application be determined by the ET at the Full Hearing. At the conclusion of the Full Hearing Employment Judge Lewis said that he would determine the costs application on the papers. The Respondent's counsel, Ms McCann, made written submissions on 28 July 2011. On 18 August 2011 the Claimant made written representations in response to the application.

6. The Respondent's application for costs was made under Rule 40(1) and/or (3) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** ("ET Rules 2004").

The Relevant Provision of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004

7. Rule 40(1):

> **"A tribunal or Employment Judge may make a costs order when on the application of a party it has postponed the day or time fixed for or adjourned a Hearing or pre-hearing review. The costs order may be against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment."**

Rule 40(2):

> **"A tribunal or Employment Judge shall consider making a costs order against a paying party where, in the opinion of the tribunal or chairman (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or Employment Judge may make a costs order against the paying party if it or he considers it appropriate to do so."**

Rule 40(3):

> **"The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived."**

Rule 41(2):

> **"The tribunal or Employment Judge may have regard to the paying party's ability to pay when considering whether it or he shall make a costs order or how much that order should be."**

8. Ms McCann on behalf of the Respondent wrote in her submissions of 28 July 2011 that the Claimant left it unreasonably late to make a request for a Norwegian Interpreter. Counsel referred to applications and representations made to the ET from 30 October 2010 in which she did not mention the need for an interpreter. Her letter of application for disclosure of 30

October displayed her advanced level of English. It was submitted that had the Claimant raised the need for a Norwegian interpreter in good time and at the very latest in her letter dated 6 November 2010 the Respondent could have set out their objections and in all likelihood the hearing fixed for 15 to 18 November 2010 would have gone ahead. It was pointed out that it was only after the Claimant's request for disclosure was refused on 8 November 2010 that the Claimant for the first time raised the issue of an interpreter by her email to the ET of 9 November 2010.

9. It was stated in the Respondent's written submissions that the request for a Norwegian interpreter was unnecessary and therefore unreasonable. The Claimant had studied, lived and worked in the United Kingdom since 2002 having studied and worked here before in the 1990s. Her level of English is good and she had studied law between 2005 and 2009 to obtain a degree and for the Legal Practice Course. The Claimant had conducted her proceedings with an excellent command of the English language. At the case management discussion ("CMD") before Employment Judge Cowling on 10 January 2011 the Claimant conceded that she did not need an interpreter.

10. It was contended by the Respondent in the written submissions of 28 July 2011 that:

> **"The adjournment of the Hearing fixed for 15 to 18 November 2010 was C's fault in that it was her unreasonable request for a Norwegian interpreter which necessitated the postponement."**

11. As to the Claimant's means, it was said that on 14 March 2011 the Claimant had been paid £22,500 for her 10% shareholding in the Respondent. Costs in the sum of £6,153.48 were claimed.

12. The Claimant lodged a response on 18 August 2011 to the application for costs. The Claimant wrote that she did not make an application to have an interpreter during the hearing but asked "if possible" one could be present. This was not an application but an enquiry. The Claimant wrote that she had not been contacted by the ET before she was notified of the decision to adjourn the hearing. She stated that had she been consulted she would have agreed to proceed with the Full Hearing. Her witnesses had arrived from Norway or were due to arrive.

13. The Claimant wrote in her Response to the costs application that:

> **"18. … As I was not consulted as to whether or not the Hearing could have proceeded without an interpreter on 15 November 2010, a Costs Order would lead to an unjust and unfair result, amounting to perversity. I did not make an application for a translator but requested whether it would be possible for one to be present."**

Responding to the reference to the Claimant's "concession" to Employment Judge Cowling that she did not need an interpreter, the Claimant wrote:

> **"Employment Judge Cowling asked me whether I would be incapable of proceeding with the Hearing, if an interpreter was not provided. I replied that I had been prepared and willing to attend the Hearing without an interpreter, but had asked whether one could be provided. I did ask what would happen should her witnesses be unable to understand or express themselves. Employment Judge Cowling said it was a good question. The issue was not discussed further."**

14. As to her means, the Claimant contended that she did not consent to the share transaction in the Respondent referred to by them and that the transaction should be dealt with in a different court.

The Costs Judgment of 6 September 2011

15. Employment Judge Lewis referred to the emailed request of 9 November 2010 by the Claimant for an interpreter and to internal correspondence on the Tribunal file. The Employment Judge recorded at paragraph 5.5 of the Judgment that by letter of 9 November the

Tribunal stated that "A Norwegian interpreter will be arranged for the Hearing." On 12 November 2010 the Respondent's solicitors objected to an adjournment and wrote that they would apply for costs if the hearing were adjourned. The ET also referred to internal correspondence on the Tribunal file that on 12 November (Friday) the ET was informed that it was not possible to arrange for a Norwegian interpreter at such short notice; Employment Judge Byrne decided on that day that the hearing due to start on the Monday be adjourned due to the unavailability of an interpreter. The Tribunal Office replied on 15 November 2010 to the Respondent's solicitor's objection to the adjournment that the lists had then been arranged. At the CMD before Judge Cowling on 10 January 2011 the Claimant said that she would not need an interpreter for the Full Hearing.

16. Employment Judge Lewis considered that the Claimant had conducted the proceedings unreasonably within the meaning of Rule 40(3) as her request for an interpreter was unreasonable. This was because she was by the time of the request of near mother tongue fluency in English and had no need for an interpreter. Further, the two witnesses appeared to be able to follow what was said at the hearing. It was unreasonable to request an interpreter for the two witnesses because their evidence was plainly irrelevant and they were able to understand English.

17. The Employment Judge decided at paragraph 12 that Miss Schaathun's email of 9 November 2010 contained "a plain request that the Tribunal make available the services of a Norwegian interpreter". He did not regard the words "if possible" as a serious qualification of the request.

18. The Employment Judge accepted that the Claimant was not consulted before a decision was taken to adjourn the substantive hearing. Employment Judge Lewis held at paragraph 13:

> **"… a request for an interpreter can only be understood as implying that the requesting party would be unable to follow the proceedings fully in the absence of an interpreter. If a party cannot follow her own case the Tribunal is in grave default of its Article 6 obligations… if the search for an interpreter is unsuccessful, it follows almost as a matter of course that the Hearing cannot proceed."**

19. The Employment Judge held at paragraph 14 that "there is no need for an applicant for costs to prove a causative link between unreasonable conduct and an award of costs." He held in paragraph 5 that the balance of considerations was in favour of an award of costs as

> **"The Claimant's actions were entirely unnecessary and the consequences entirely foreseeable."**

20. The Employment Judge ordered the Claimant to pay the Respondent costs in the sum of £2,500. In doing so he said that he had taken into account information given by the Claimant about her means.

The Submissions of the Parties on Appeal

21. Miss Schathuun rightly stated that the costs order was made on the basis that she had asked for a Norwegian interpreter to be present at the Full Hearing at a late stage and that an adjournment of the hearing was entirely foreseeable. The Employment Judge decided that applying for an interpreter at a late stage with these foreseeable consequences was unreasonable conduct.

22. Miss Schaathun contended that by her email of 9 November 2010 she had merely enquired that "if possible" a Norwegian interpreter be present. She did not say that she could not proceed without an interpreter nor did she ask for the hearing to be adjourned if an interpreter could not be present. In their email to the ET of 12 November 2010 the solicitors for

the Respondent rightly stated that Miss Schaathun was not applying for the hearing to be postponed. The Respondent understood that she sought, it if was possible, for an interpreter to be present and that she did not ask for one to be provided by the Tribunal. The Respondent's solicitor observed that she could have intended to bring her own interpreter to the hearing.

23. Miss Schaathun submitted that it had not been her intention to achieve a postponement. This would have incurred costs for her mother and friend Ms Kaldhol. They had already arrived in England from Norway. Their travel costs had already been incurred before 9 November 2010.

24. Miss Schaathun referred to paragraph 19 of the judgment of the Employment Appeal Tribunal in **Dr Osonnaya v Queen Mary University of London** 25 November 2011 UKEAT/ 0225/11/SM in which HH Judge McMullen QC held that the use of the word "unreasonable" in ET Rule 40(3) requires a high threshold to be passed before a costs order is made. The enquiry whether a translator could be present at the Full Hearing was not unreasonable and did not cross that high threshold.

25. The Respondent's written submissions referred to the judgment of the Court of Appeal in **Barnsley Metropolitan Borough Council v Yerrakalva** [2011] EWCA Civ 1255 in which it was said at paragraph 7 that as costs are in the discretion of the ET, appeals on costs alone rarely succeed in the Employment Appeal Tribunal or in the Court of Appeal. An appeal will succeed only if the order was obviously wrong. The Court of Appeal emphasised at paragraph 41 that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there had been unreasonable conduct in bringing or conducting the case, what was unreasonable about it and what effects it had. The ET does

not have to decide whether there was a precise causal link between the unreasonable conduct in question and the costs being claimed.

26. It was submitted on the behalf of the Respondent that the Employment Judge correctly identified the legal test to be applied in making a costs order and reached a conclusion which was open to him on the facts. The decision of the ET was that the Claimant had asked for an interpreter to be made available. Where one cannot be found, a decision that the hearing cannot proceed was not perverse. The Employment Judge did not err in finding that such a request for an interpreter was unreasonable conduct. The Employment Judge took account of the Claimant's statement of her means in determining the amount of the costs award.

Discussion and Conclusion

27. In our judgment Employment Judge Lewis erred in construing the Claimant's email of 9 November 2010 as a request that the Tribunal make a Norwegian interpreter available for the substantive hearing. The Claimant was asking if it was possible for an interpreter to be present. She did not indicate that she would or was applying for an adjournment if that was not possible. That this is the natural interpretation of the Claimant's email of 9 November is supported by the understanding of the solicitors for the Respondent. They wrote in their email to the Tribunal of 12 November 2010:

> **"In our view, the Claimant's email is not applying for the hearing to be postponed. She… asks if it is possible for a Norwegian translator to be present."**

Further, the solicitors rightly make the point that:

> **"She does not expressly ask the Tribunal to provide a translator. To all intents and purposes, she could have intended to bring her own translator to the hearing. At the very least, we would submit that the Respondent should have been given the opportunity to provide a translator."**

The challenge made in ground 7.1.1 of the Notice of Appeal to paragraph 12 of the Judgment is made out. The Employment Judge erred in failing to construe the email of 9 November 2011 as an enquiry whether it would be possible to have an interpreter present. A reading that the Claimant had applied for the Tribunal to provide a interpreter was not open to the Employment Judge.

28. Further, grounds 7.1.2 and 7.1.3 of the Notice of Appeal are well founded. The Claimant had not asked for an adjournment. She was not asked whether she would be prepared to conduct her case at the Full Hearing without an interpreter being present. When asked this question at the Case Management Hearing before Employment Judge Cowling on 10 January 2011, the Claimant said that she would not require the services of an interpreter at the substantive hearing. As is contended in paragraph 7.14 of the Notice of Appeal, the conclusion of Employment Judge Lewis in paragraph 15 that it was "entirely foreseeable" that the Claimant's email of 9 November 2010 would result in an adjournment of the substantive hearing listed for 12 and 13 November 2010 is not supported by the facts and was a perverse conclusion. Not only did the Employment Judge attribute a meaning to the email which was not warranted, but also the Claimant was not asked whether she was prepared to proceed without an interpreter. The enquiry whether it was possible to have an interpreter present did not inevitably make it necessary to adjourn the hearing. For a non-native speaker whose command of English was good but not perfect to make an enquiry whether it would be possible for an interpreter to be present at the Full Hearing of her claim cannot, in our judgment, be categorised as unreasonable conduct of proceedings.

29. Whilst Employment Tribunals have a wide margin of discretion in making costs awards and appellate courts will rarely overturn their decision, this is a case in which the decision to

award costs was ill founded and perverse. It must be set aside. In could not be concluded that the high threshold of reprehensible conduct properly to be categorised as unreasonable was reached in this case.

30. In light of our conclusion that the decision to make any costs award is to be set aside it is not necessary to decide whether the Employment Judge erred in determining the amount of costs to be paid.

Disposal

31. The decision to make an order for costs is set aside as is the order that the Claimant is to pay the Respondent costs in the sum of £2,500.