Appeal No. UKEAT/0121/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 July 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR J C WOODS — APPELLANT

SOMERSET COUNTY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN WOODS (The Appellant in Person)
For the Respondent	MR JAMES DAWSON (of Counsel) Instructed by: Somerset County Council Legal Services County Hall Corporation Street Taunton Somerset TA1 4DY

SUMMARY

CONTRACT OF EMPLOYMENT – Whether established

PRACTICE AND PROCEDURE

The Claimant was a relief Registrar of Births, Deaths and Marriages, who worked for Somerset County Council. He did so under arrangements which imposed on him no obligation to accept work if offered, nor on the council to offer any. The Employment Judge found that the control necessary to define any contract as being one of employment was lacking. However, the Claimant gave evidence that he had worked during each of the last 52 weeks of his employment save 3, for which he said he had had notified the Council he was taking annual leave. When he claimed he had been unfairly dismissed, the Employment Tribunal determined employment status as a preliminary issue, and concluded that because of a lack of mutuality and absence of control he was not an employee, and that it was therefore unnecessary to consider the impact of the continuity of employment provisions in the ERA 1996. He appealed on the ground that a statutory provision required anyone functioning as a registrar to be an employee; and that in any event the Employment Judge should have considered the effect of s.212(3) ERA (continuity of employment, accepting annual leave as a custom or arrangement within (c)). The statutory argument was rejected on a proper interpretation and application of the relevant provisions, and the "continuity" point because there had been no appeal against the findings of an absence of mutuality and (more importantly) control (rejecting an application to amend, applying **Khudados v Leggate**). A further ground, that the Employment Judge should have heard the Claimant orally before determining to reject his application to strike out the Respondents' Answer, was rejected. Though it would have been advisable for the Employment Judge to have done so, it was not obligatory and the prejudice on which the Claimant relied could have been the subject of an application by him to adjourn the hearing, which he did not make.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. On 31st. January 2014 Employment Judge Carstairs sat at the Exeter Tribunal to determine a preliminary issue which had arisen in a case which Mr Woods brought against Somerset County Council. He considered two issues: whether the Claimant was an employee and, secondly, whether the response should be struck out because of the Respondent's failure to comply with a case management order made on 10 December 2013. For reasons given on 10 February 2014 he rejected the Claimant's case on both.

2. The Claimant sought a review. For reasons which extended to four pages and 26 paragraphs Employment Judge Carstairs rejected the application on 28 February 2014.

3. The Claimant now appeals against the decision of 10 February. It is relevant to consider aspects of the decision on review.

The Facts

4. The essential facts were that the Claimant acted as a Relief Registration Officer in the West Somerset area. Though engaged under terms which described the work as casual, and under arrangements which provided that the Council was under no obligation to offer work at any particular time nor the Claimant to accept it, and which gave the Claimant an unfettered right of substitution from amongst a panel of others who were also qualified to act as Registrars, he argued that in fact he worked consistently for some days in every week of the last 12 months before the requirement of the Council for his services came to an end, when the

Council notified him of this. There were at least some exceptions to that, amounting on the Claimant's contention to a three-week period in respect of which he had pre-notified holiday.

5. He claimed that he had been dismissed from employment and, secondly, that he had suffered a detriment for making a public interest disclosure.

The Law

6. The first of those claims depended critically on whether he was or was not an employee. The definition of "employee" for these purposes is that contained in the **Employment Rights Act 1996** at section 230:

> **"(1) ... employee means an individual who has entered into or works under...a contract of employment.**
>
> **(2) In this Act 'contract of employment means a contract of service or apprenticeship, whether express or implied, and...whether oral or in writing."**

7. In a case in which casual work which is regularly done is established, claimants may show that they have gained the right not to be unfairly dismissed in one of two circumstances, each of which needs carefully to be distinguished from the other. The first is that the periods during which they work are joined together by an umbrella or overarching contract which provides that throughout the whole of the period they are employees even if called upon to work as such only intermittently during the currency of that contract.

8. The second is that they are employed under a succession of individual contracts, each of short (and it may be very short) duration, but in respect of which, when they work, it is plain that they are providing their work personally for pay, thereby demonstrating a mutuality of obligation between themselves and the employer at the time. Provided that the contract is otherwise a contract of employment, albeit short, the question then arises whether the right to

claim unfair dismissal has accrued because of the provisions in part XIV of the **Employment Rights Act 1996** relating to continuous employment. In particular section 212 provides materially as follows:

> **"(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment...**
>
> **(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is –**
>
> **(a) incapable of work in consequence of sickness or injury,**
>
> **(b) absent from work on account of a temporary cessation of work, or**
>
> **(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, counts in computing the employee's period of employment."**

9. Thus the Claimant here might have qualified for unfair dismissal rights either under an umbrella contract, or by virtue of the continuity provisions of section 212 if there was no overarching contract. The contract, however, in both cases would need to be a contract of employment. A contract by which work is done is not necessarily a contract of employment. Here again there is a need to make careful distinctions between the cases which may be relevant. Many authorities are decided in the context of a choice presented by the parties as to whether the person providing work is self-employed or an employee. The distinction there between a contract for services or a contract of service is the critical one. It is this on which the court's decision focuses. Some may be concerned with whether the agreement is one of employment at all, as where the contract is one of licensing an individual to do work on the premises (as in **Yuen v The Royal Hong Kong Golf Club (Hong Kong)** [1997] UKPC 40, or as might be the case of a lap-dancer at Stringfellows (see [2012] EWCA Civ 1735)). Other authorities are concerned with the nature of the arrangement between the parties under which from time to time a person may be called upon to provide work. This, as I have pointed out, may be either under an umbrella contract or a succession of individual contracts.

10. The Judge found these relevant facts in order to determine what was a question of fact (see **Carmichael v National Power plc** [1999] ICR 1226 HL), namely whether there is a contract of employment (stressing those last two words). First, he found that the Claimant had no obligation to work. Where he did not turn up to work, which happened on one occasion, he would not be subject to discipline as an employee might be. Second, he found at paragraph 3.7 that the only supervision to which the Claimant was subject was an annual inspection conducted by the County Registrar, a purely technical assessment to ensure that he was working to the right standard. He had trained, but had taken himself off training with no repercussions from the Respondent. He worked to a roster. But he was not obliged, if he did not wish, to work the sessions he was offered in accordance with the roster.

11. Having recited much of the case-law, though without drawing any specific conclusions from it by reference to those cases, the Judge turned to consider the two arguments which had been put to him in respect of employment. The first was that a Registration Officer could only provide service as such if he was actually an employee. It was obligatory for him to be one. This was said by the Claimant to be provided for by the **Statistics and Registration Service Act 2007** and the earlier **Registration Service Act 1953**. What had happened here was that section 6 of the Act of 1953 was originally drafted to provide that a Registrar of Births and Deaths "shall be a salaried officer paid by the council of the non-metropolitan county or metropolitan district is situated" and by 6(4) that every "superintendent registrar and every registrar of births and deaths shall hold office during the pleasure of the Registrar General". Those particular provisions caused the Employment Appeal Tribunal in the case of **Lincolnshire County Council & Anor v Hopper** UKEAT 819/01 (24 May 2002) to conclude that a Registrar was not an employee of the local Council. The local Council had no power of dismissal. It followed that a Registrar who was no longer provided with work by the local

council would have no right to complain to an Employment Tribunal. To remedy that position, Parliament enacted section 69 of the **Statistics and Registration Service Act 2007**, which provided that every person who, at the commencement of the coming into force of the section was a Superintendent Registrar or Registrar of Births and Deaths or Deputy Superintendent Registrar or Deputy Registrar should become an employee of the relevant local authority.

12. This section did not provide that any person to be appointed in the future had necessarily to be an employee: but the Claimant argued, and argues on appeal before me, that that was the effect of the legislation, because section 70 introduced an amendment to what had been section 6 of the 1953 Act. That had the effect of removing the words "salaried officer paid by" from subsection (3) and substituting "an officer of", so that instead of the words indicating that the role of the Council was only to pay, it now indicated that the person concerned was an officer *of the Council*, indicating an employment relationship.

13. The amendment omitted subsection (4). The result was that a Superintendent Registrar, Registrar or Deputy Registrar no longer would hold office during the pleasure of the Registrar General. If an employee, therefore, such an officer would have employment rights.

14. The Judge in the present case accepted the argument of counsel for the County Council that the Act did not provide that anyone who fulfilled the function of Registrar was by statute an employee of the local Council. He did so holding that the normal provisions relating to employment applied to those working for a local authority registration service. Thus they might be employees of the local Council, but they did not have to be.

15. As to the second question which arose, once the Judge had determined that simply by virtue of being a Registrar the Claimant was not necessarily an employee, was whether he had actually entered a contract of employment. Here the Judgment is to an extent deficient. It did not consider separately the cases in respect of an overarching or umbrella contract and distinguish them from those in respect of continuity of employment.

16. Such a distinction is clearly made by, for instance, Elias J in **Stephenson v Delphi Diesel Systems** [2003] ICR 471 EAT (see paragraph 12). He thought that, without some mutuality, amounting to what was sometimes called an irreducible minimum of obligation, no contract existed when considering an overriding, overarching contract. But at paragraph 13 he observed:

> **"The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will. Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations."**

17. That view was endorsed by the Appeal Tribunal in **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181, and it was noted in **Prater v Cornwall County Council** [2006] 2 All ER 1013 CA that a succession of individual contracts for work, within each of which there was mutuality of obligation relating to the work provided and performed under the contract, could be contracts of service, despite the fact that there was no continuing or further obligation on the one party to offer more work or on the other party to accept the work.

18. The Judge expressed his conclusion in the context that the parties had seen the relationship as being that of an employer using the services of a casual sessional worker, who

would be offered work from time to time, though there was no guarantee to that effect, and he was not obliged to accept it, in the following decisive terms at paragraph 5.2.10:

> **"Consideration must be given, first, to the irreducible minimum of obligation and control (see *Montgomery*) [that was a reference to *Montgomery v Johnson Underwood Ltd* 2001 IRLR 269 CA]. As noted above there was no obligation for work either to be offered or accepted. Furthermore there was inadequate control of the Claimant's work. This was far from the normal arrangement of regular control on a daily, weekly, or monthly basis. All that happened was that there was an annual appraisal to check that the Claimant was complying technically with the way the services he provided work done [sic].**
>
> **5.2.11 In those circumstances the Claimant was not an employee."**

19. When his reasons were challenged on review, and it was argued by the Claimant that the Judge had not dealt with his case as to continuity of employment under section 212 (the Claimant assuming this was because the Judge had accepted an argument put forward by Mr Dawson, Counsel for the County Council, that there could be no continuity of employment because of the gaps in service), the Judge pithily said, so far as that argument was concerned that:

> **"The Tribunal did not adopt Mr Dawson's argument regarding lack of continuity."**

20. Earlier, in the review application, the Judge had referred to the decisive issue for the Tribunal being the "irreducible minimum of obligation and control".

21. Finally, in his decision, at the very end, the Judge dealt with the second of the two issues he had identified at the outset. Under the heading "Should the response be struck out?", he reasoned:

> **"No submission was made as to whether the response should be struck out. There is no evidence that the Claimant had been prejudiced by any failure of the Respondent. In any event, the full merits hearing remains to be listed. Accordingly, a telephone case management re-hearing will be fixed to discuss further case management and fix a date for the hearing.**
>
> **5.3.3 The Response is not therefore struck out."**

The Appellant's Case

22. The appeal takes three points. The first is that the Tribunal failed to consider section 212(3)(c) of the 1996 Act as relevant despite, it is said by the Claimant, having accepted that in general the only reason the Appellant declined work was to take holiday leave. There is, so far as I can see, no actual finding to that effect.

23. Secondly, it was argued that the Judge was wrong to conclude as he did in respect of the effect of the **Statistics and Registration Act 2007**.

24. Thirdly, it is argued that the Tribunal failed to ensure that the overriding objective was applied when it failed to carry out its own directions. This was a complaint that the Respondent's Answer should have been struck out because of the failure procedurally of the Respondent to agree a bundle in the time required by a case management order of 10 December. I shall say more about this shortly.

Ground 1

25. I shall deal with each of the grounds in turn. The first ground met the response from Mr Dawson, in his Skeleton Argument, as follows, which seems to me to encapsulate the argument:

> **"The difficulty the Claimant's argument runs into, however, is that a lack of continuity was not the reason that Employment Judge Carstairs found that he was not an employee. The Employment Judge did not base his decision on qualifying service or on a break in the continuity of employment; rather he found that the relationship between the Claimant and the Respondent had neither mutuality of obligation nor sufficient control for it to be a contract of employment."**

26. Later, at paragraph 29 of his Skeleton, he observed that the Claimant had not challenged the central plank of the judgment, namely that there was insufficient mutuality of obligation or control for a contract of employment to exist.

27. I read the decision of the Judge in the same way as, plainly, does Mr Dawson, that the Judge was saying that it was unnecessary to consider any question of continuity of employment. The matter simply did not arise. That is because none of the work which the Claimant did was, in his view, work under a contract of employment. That was because, in his view, there was neither mutuality of obligation nor was there a sufficiency of control to make it so. It is a fact that there was no ground of appeal which attacked either of those findings.

28. Prompted by recognition of this and early exchanges during this hearing, the Claimant, who appears in person as he has done throughout, made a written application to amend the appeal. This was by way of addition to the existing grounds. The written application reads as follows:

> **"(1) The Appellant would wish to amend the appeal to include the Tribunal's failure to fully explore the correct interpretation of 'mutuality of obligation' and 'control'.**
>
> **(2) The Respondent acted as an employer when the Respondent provided office accommodation, salary and holiday pay. The Respondent also organised the appointments that the Appellant completed on any one day, and the Respondent decided which Registration Officer would attend which wedding ceremony.**
>
> **(3) The Respondent would ask the EAT to permit this amendment.**
>
> **(4) Additionally the EAT would recognise there was no option of 'substitution' other than with another qualified Registration Officer."**

29. I gave a little time for Mr Woods to formulate those grounds, and in the light of observations made from the Bench, for Mr Dawson to consider the Respondent's position.

30. The application was resisted. Mr Dawson referred me to one of the Employment Appeal Tribunal's familiar authorities, **Khudados v Leggate** [2005] ICR 1013. At paragraph 86 that sets out the general principles by which an amendment proposed at appeal should be determined. The principal factors to which the Appeal Tribunal drew attention were whether the applicant had made the application as soon as the need for amendment was known. The observation was made that that was of considerable importance:

> **"The requirement is not simply aspirational or an expression of hope. It does not set a target but is a requirement that must be met in order to advance the efficient and speedy dispatch and conduct of appeals",**

observing at (b) that an extension of time was an indulgence. Mr Dawson submitted that here the Appellant had been given full notice, ever since the decision was reached by Judge Carstairs, that he reached it based upon the twin pillars of mutuality of obligation and control. Each was therefore in issue. That was plain from the paragraphs I have cited from the Judgment on review. It was made abundantly clear at the very latest 14 days before this hearing in the Skeleton Argument produced by Mr Dawson, the last paragraph of which I have already cited from.

31. Secondly, he said that there had been no acceptable explanation for the delay in making the application. The third factor is the extent to which, if any, a proposed amendment if allowed would cause any delay. In **Khudados** this is said:

> **"Clearly proposed amendments that raise a crisp point of law closely related to existing grounds of appeal, or offering limited particulars that flesh out existing grounds, are much more likely to be allowed than wholly new grounds of perversity raising issues of complex fact and requiring consideration of a volume of documents, including witness statements and notes of evidence. Such amendments if allowed are bound to cause delay and extra expense. The latter class of amendments should be contrasted with the first. In many cases in the first category the party against whom permission to amend is sought will be in no worse position than if the amended grounds had been included in the original Notice of Appeal."**

32. (d) is whether allowing the amendment would cause prejudice to the opposite party. The observation is made that in some cases it might be necessary to consider the merits of the proposed amendments, (e), and at (f) that regard must be had to the public interest in ensuring that business in the Appeal Tribunal is conducted expeditiously and its resources used efficiently.

33. All of those points remain as valid now as they were in 2005 when the Appeal Tribunal gave voice to them. We would emphasise, in particular, the question of prejudice.

34. Here Mr Dawson complained not only of the fact that the application had been made very much at the last limit and that there had been no good reason for it save the form the argument took this morning, a fact which the Claimant, in effect, recognises by his submission in response that the reason for the delay was the intricacy of the point and he had not fully made himself familiar with it before today.

35. Mr Dawson argued that he had been placed somewhat on the back foot, having assumed, because of the clarity of the point as a reason for the Judge's decision, that it had not been taken and, in particular, in respect of the finding of fact as to control, that there had been no hint that there was any challenge to that by the legal cases to which he had been referred by the Tribunal. He referred, in particular, to **White & Anr v Troutbeck SA** [2013] EWCA Civ 1171 and **Dakin v Brighton Marina Residential Management Co Ltd** UKEAT/0380/12/SM, a decision of 26 April 2013 (Langstaff J, see paragraphs 32 and 33) to the effect that what is important in dealing with the question of control is not whether control is exercised as a matter of fact but whether as a matter of contractual entitlement the employer has a right to direct the employee and to exercise control in that sense. Following from the classic exposition in

Zuijs v Wirth Bros Pty Ltd [1955] 93 CLR 561 and the observations of Dixon J in **Humberstone v Northern Timber Mills** [1949] 79 CLR 389, which was cited by MacKenna J in the well-known **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497, he argued that he would have wished to conduct further research, both into the available factual material but more particularly into the legal authorities, of which there are a considerable number in this area, which may not entirely speak with one voice. He noted that he was at some disadvantage, therefore, albeit able to an extent to respond.

36. I accepted from what he said that fairness would require that he should be entitled to an adjournment if the amendment were to be permitted. When I asked Mr Woods whether he wished there to be an adjournment, he frankly told me that he did not. I indicated that if there were to be one, it would be necessarily at his expense, because of the way in which the amendment had been made late in the day and there had been no reasonable opportunity for the Respondent to prepare for it. This he was not prepared to countenance. I fully understand that position, but it has this consequence, that there is prejudice to the Respondent which can be remedied by an adjournment, but adjournment would itself cause prejudice to the Claimant. I take it very much into account in deciding whether I should in this case exercise my discretion to permit the amendment.

37. As Mr Dawson would, if pushed to the extreme, tend to admit, there are some hints and nudges in the papers that mutuality of obligation might be arguable. It was referred to by Lady Stacey in her comments on the sift, even though it did not become part of any ground of appeal. There is no such reference, however, to control and it is the absence of that that seems to me problematic. I am, and would have been, prepared to hold that it would be painfully obvious that any person providing services for money as a Registrar would during the time they

actually provided those services be providing them personally under a contract with the Council in the expectation of reward. There would be, to that limited extent, mutuality of obligation. In this I see entirely eye to eye with that which Elias J expressed in **Stephenson**.

38. But the issue of control is not so easily resolved. There are substantial grounds, as it seems to me, for not so readily supposing that an office holder, acting in a capacity such as a Registrar, as to which there may be a considerable degree of independence, is subject to direct control in the same way as other employees might be. The obligations in respect of control, if they are not spelled out in the contract, and if there has been no argument as to the features of the contract which lead one to suppose that there is such a right, can only be derived from that which the parties do as indicating that which they had earlier agreed. Here the Judge demonstrated the considerable paucity of such evidence.

39. I have, in the upshot, come to the conclusion that, despite the fact that the Claimant is a litigant in person, the same principles must apply, appropriately modified, as do between those who are professionally represented. A Notice of Appeal is an important document. It focuses the minds of the parties. It is that to which a Respondent – whether professionally represented or not – responds. An amendment may be made to it. But the factors mentioned in paragraph 86 of **Khudados** apply, in particular time, the nature of the explanation, prejudice, the effect that an adjournment would have if there were to be one upon other business in the courts, and the fact that in this case, it seems to me, Mr Woods is well capable of presenting an argument, even though not a qualified lawyer. He was well equipped to identify that he did not accept (if he did not) that there was the lack of control to which the Judge drew direct attention.

40. For those reasons, I have been persuaded to the conclusion, somewhat against my earlier instincts, to refuse this application for amendment.

41. That done, the decision made by the Judge was that there was no contract of employment on any of the occasions when the Claimant actually worked providing Registrar services. There was no sufficient control to make it a contract of employment even if contract it was. The net result is that there was no possibility here of the continuity of employment provisions becoming relevant. Accordingly I accept Mr Dawson's submissions that ground 1 must be rejected.

Ground 2

42. Ground 2 deals with the effect of the **Statistics and Registration Act 2007**. I have already expressed my view that the form of the Act was not such as to require that any Registrar, whether temporary, deputy or superintendent must necessarily be an employee of the Council. I see no reason to suppose that the arrangements by which some workers are engaged from time to time under arrangements which are not contractual, but convenient, for them to do such work should not apply to Registrar services as they do elsewhere in the employment world. It was open to the Judge to find that the Claimant was an employee, but critically for this ground of appeal, in my view, he did not have to.

Ground 3

43. The third ground of appeal is essentially procedural. The Judge did not hear submissions, as indeed in effect he recorded in the Judgment, before making a ruling upon that upon which there had been written submissions, namely the question of striking out the response. The Claimant argues that he should have been given an opportunity to put his case to

the Judge. He complains, more centrally, as he would see it, that the Judge had an application to strike out the response, which logically he should have dealt with before he considered the question of employment status.

44. That is because, if the Response was struck out, then it would simply be for him, the Claimant, to establish his case, which would be considerably easier. The application to strike out was made on 27 January 2014. It related to an order made on 10 December 2013, part of which provided that a combined set of relevant documents should be agreed and exchanged not less than 14 days before the hearing, with witness statements to be prepared and exchanged not less than seven days before the hearing. The Claimant had sought to honour this Order. He complained about a failure by the Respondent to ensure that the bundle was agreed before 17 January, which was the scheduled date. He had attended the Respondent's offices on 14 January to deliver his documents to be included in the bundle. He had been given only a misleading snapshot of the schedule of the hours which he worked instead of a full schedule, which it was necessary to argue the continuity of employment points which at that stage it was thought would arise. The situation at the time of his application four days before the hearing was that the bundle had been neither completed not exchanged. Witness statements had not had their references to the bundle updated nor had they been exchanged. As he put it:

> **"The Claimant is left with no bundle, no Respondent witness statements and no time to properly prepare for the hearing."**

45. He asked, therefore, that the Response be struck out. He complains before me that, when he got the bundle, which was in fact four days before the hearing, it contained some 39 additional pages of material. It contained a number of e-mails, which were he thought selectively chosen so as to demonstrate the Respondent's points, without giving him the

opportunity to see what material the Respondents had which might support his case, particularly as to control and mutuality of obligation.

46. These matters, he argued, should have been dealt with before the hearing began, but virtually as soon as he came into the Tribunal chamber the Judge invited him to take the witness stand and to give evidence upon the first of the points in the order in which the Judge had prescribed them.

47. The response to this by Mr Dawson is to refer to the points of principle set out by the Appeal Tribunal in **Weir Valves and Controls v Armitage** [2004] ICR 371, which explored the principles upon which an Employment Tribunal should act in deciding whether to strike out a case where there has been a breach of direction (see paragraphs 13-18). The Appeal Tribunal observed:

> **"17...it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."**

At paragraph 27 it reiterated the importance of judging whether a fair hearing was possible, observing:

> **"What the Employment Tribunal must do is address its mind to the issues in the case, address its mind to the fairness of allowing the case to proceed in the face of the default and reach an objective decision as to whether a fair trial is possible."**

At 33:

> **"If some unfairness had accrued from one or more of the Appellant's witness statements being served at the last moment, or taking unfair advantage of the failure to exchange, we consider that the Employment Tribunal would have had a remedy short of the sanctions remedy. It would have had the power, by combination of Rule 4 and Rule 16 [those being references to the then existing Rules] to exclude all or part of such a witness statement if it was proportionate to do so having regard to the default and to the overriding objective."**

48. I would observe that that last paragraph is by reference to the particular facts of the appeal. Normally, where there is a default which the passage of more time may remedy, a proportionate sanction will usually be to permit an adjournment if requested by a party. Despite the difficulty which the Claimant here asserts, he did not ask for an adjournment. The application to strike out the Respondent's notice is essentially a complaint that he did not have sufficient time to prepare properly for the hearing. It is precisely that type of complaint which the grant of more time by a responsive Tribunal is likely to remedy. But a Tribunal can only be expected to do so if asked. And it is not a failure in law of a Tribunal not to offer an adjournment.

49. Here, the essential question, as it seems to me, is whether there is any clear evidence that the position of the Claimant was prejudiced by the failures of the Respondent. As to that, first it seems to me that the procedure which the Judge adopted was not one which should be followed by other Tribunals in similar circumstances. There was here an application made on paper which had not been resolved prior to the hearing. The hearing was a hearing at which the Claimant attended in person. The Judge had specified at the outset that there would be two issues, one of which was this. He would have been better to have asked the Claimant for submissions specifically addressed to the issue raised by his application.

50. I reject the point made by Mr Woods that he had to decide the question of strike-out prior to the hearing as a matter of necessary law. Logically, I see the force of it. But it is not so overwhelming as to make me think that he must necessarily have exercised the discretion conferred by Rule 41 of the Rules improperly. That rule gives a wide latitude.

51. Having set the order in which the two issues were to be heard, and the Claimant being there, and - assuming that he was before the Tribunal as he has appeared to me today, able to put arguments and keen to do so - the Judge in my view should have invited him to add anything which he wished to orally. Had he done so, he would have advanced to the Judge those matters which he advanced to me today, I have little doubt. What he said was that he should have had more time, that he was prejudiced in that he had not been given full disclosure but had been provided with some e-mails only, and others should have been found if they advanced or denied the Respondent's case, and that he was prejudiced all the way through the hearing by the late addition of the papers. He likened it to being ambushed by the Respondent. He had no opportunity to see a solicitor before entering the hearing.

52. Mr Dawson responds that Mr.Wood's witness statements, when disclosed, show a considerable cross-referencing with a bundle which consisted of more than the 90 pages of the original bundle. Although some references are given with "X" as a reference, those relate to timesheets or records of time worked. Other references appear to be specific. He was thus able within the time he had to attend to this detailed work.

53. Ultimately I have concluded that the prejudice asserted is essentially that of not having sufficient time to deal with the material produced by the Respondent. As I have indicated, a response to that could have been an application for adjournment. As to whether the lack of preparation timer caused prejudice in the actual conduct of the hearing, the Judge gave his view in paragraph 5.3.2 that there was no evidence of it.

54. The result of the hearing was to dismiss any claim based upon the Claimant's status as employee. It left untouched any argument which he had in respect of public interest disclosure. The Judge thought that relevant to the issue of prejudice. It is not suggested it was not.

55. Ultimately, though I consider, as I have indicated, that the Judge should in fairness have given the Claimant an express invitation to exercise his right to address him on the issue (he was not, I emphasise, denied the opportunity to ask to do so), given the nature of the prejudice asserted and the Judge's observations, and given what was said later in respect of the application for review, when the Claimant had a further opportunity to persuade the Judge, albeit on paper, I have concluded there is no such evidence here of prejudice to the Claimant as would persuade me that this ground of appeal should succeed.

56. With those reservations, and for those reasons, I therefore dismiss this appeal. I am grateful to Mr Woods for his careful explanation of the points he wished to make and for the interest of them, and I have already paid tribute to the argument of Mr Dawson. I am sorry to both parties that we have more than used up the court day, and I hope that has caused no particular inconvenience to anyone.